In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-69

UNITED STATES OF AMERICA, *Appellant*,

v.

GEORGE JOSEPH ORITO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

INDEX

RELEVANT DOCKET ENTRIES

The indictment, dated February 10, 1970

Motion to dismiss the indictment based upon the allegation that the statute is overbroad, dated August 17, 1970

Decision and order granting the motion to dismiss, dated October 28, 1970

The notice of Appeal to the Supreme Court, dated October 29, 1970.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, *Plaintiff,* vs. GEORGE JOSEPH ORITO, *Defendant.*	*INDICTMENT* NO. 70-CR20 (Title 18, Section 1462, United States Code)

The Grand Jury Charges:

On or about the 1st day of January, 1970,

GEORGE JOSEPH ORITO,

did knowingly transport and carry in interstate commerce from San Francisco, State of California, to Milwaukee, in the Eastern District of Wisconsin, by means of a common carrier, that is, Trans-World Airlines and North Central Airlines, copies of obscene, lewd, lascivious, and filthy materials, that is:

1. Sixty-eight reels of 8 mm color movies as follows:
   a) Nine copies labeled number 5
   b) Ten copies labeled number 6
   c) Eight copies labeled number 7
   d) Six copies labeled number 8
   e) Eight copies labeled number 10
   f) Nine copies labeled number 11
   g) Seven copies labeled number 12
   h) Seven copies labeled number 13
   i) Four copies labeled number 14

2. Two 16 mm negatives as follows:

   One negative labeled "O'Hara"
   One negative bearing no title on an odd sized yellow Kodak reel

3. Three 16 mm black and white films as follows:
   a) One copy of film titled "West Side Story"
   b) One copy of film titled "Just Fucking and Sucking"

c) One 16 mm black and white film bearing no title, on a metallic green reel.

4. One 16 mm color film as follows:

a) One 16 mm film labeled "Demonstrations With Sales" by "Su Kolor Art Film Corporation"

5. Eight 8 mm black and white films, as follows:

a) One bearing letter A
b) One bearing letter L
c) One bearing letter N
d) One bearing letter T
e) One bearing letter M
f) One bearing letter G
g) One bearing letter Z
h) One bearing letter K

All in violation of Section 1462, Title 18, United States Code of Laws.

A TRUE BILL:

Dated: February 10, 1970

/s/ Richard Mercier
Foreman

/s/ David J. Cannon
DAVID J. CANNON
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, *Plaintiff*, v. GEORGE JOSEPH ORITO, *Defendant*.	Case #70–CR–20

MOTION TO DISMISS

COMES NOW the defendant in the above-entitled action, by his attorneys, SHELLOW & SHELLOW and, pursuant to the provisions of Rule 12 of the Federal Rules of Criminal Procedure, respectfully moves this Court for the entry of an order dismissing this Indictment on the grounds that Section 1462 of Title 18, United States Code, is unconstitutional in that said Statute imposes criminal sanctions upon the transportation in interstate commerce of obscene publications; defendant respectfully asserts that regardless of whether the transportation is for the purpose of commercial distribution or for the personal possession and enjoyment of the transporter, this statute violates rights guaranteed to the possessor or transporter by the First and Ninth Amendments to the United States Constitution.

The defendant respectfully asserts that if this statute is applied and construed to impose criminal sanctions upon the interstate transportation of obscene material which is intended for the personal use of the transporter and possessor, then this statute is void for overbreadth and violates rights guaranteed to the transporter by the Ninth Amendment. On the other hand, should this statute be construed to impose criminal sanctions only upon those who utilize interstate commerce for the purpose of the commercial distribution of obscene material, then this statute denies to the defendant the right to sell and distribute obscene material which is predicated upon the correlative

right of an intended recipient to purchase and enjoy this material.

Dated at Milwaukee, Wisconsin, August 17, 1970.

Respectfully submitted,

SHELLOW & SHELLOW
/s/ James M. Shellow
JAMES M. SHELLOW

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

No. 70–CR–20

UNITED STATES OF AMERICA, *Plaintiff*,

v.

GEORGE JOSEPH ORITO, *Defendant*

Decision and Order

Two motions to dismiss the indictment are now before the court. In both motions, the defendant contends that 18 U.S.C. § 1462 is unconstitutional. One motion is based on the absence of any provision in the statute requiring proof of scienter; the other is based on the defendant's contention that the statute is overbroad and violates the first and ninth amendments in imposing criminal sanctions for the interstate transportation of obscene material which may be designed for personal use.

The defendant was charged in a one-count indictment which alleges that he knowingly transported in interstate commerce, by means of a common carrier, certain "copies of obscene, lewd, lascivious, and filthy materials".

The court must decide whether *Stanley* v. *Georgia*, 394 U.S. 537 (1969) and *Redrup* v. *New York*, 386 U.S. 767 (1967) render § 1462 unconstitutional because such section proscribes all transportation of obscene materials without discriminating as to whether such materials are "pandered", exposed to children or imposed on unwilling adults.

The defendant urges that under *Stanley* the transportation and receipt of obscene matter for private use is constitutionally protected, and that only certain types of public distribution of obscene matter, as described in *Redrup*, may be subjected to governmental control. The United States, on the other hand, urges that *Stanley* did not purport to modify *Roth* v. *United States*, 354 U.S. 476 (1957) and that, on its limited facts, *Stanley* permits an individual to possess obscene materials in his own home, but it does not grant one a protected right to transport or receive such materials.

In its per curiam opinion in *Redrup* v. *New York*, 386 U.S. 767 (1967), the court observed that in none of the cases which were then before the court ". . . was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." (p. 769).

Two courts of appeal have decided cases which tend to support the government's position. In *United States* v. *Melvin*, 419 F. 2d 136 (4th Cir. 1969), the court concluded that notwithstanding Stanley, "Congress has the power to forbid interstate transportation of obscenity." (p. 139). Also, in *United States* v. *Fragus*, 428 F. 2d 1211 (5th Cir. 1970), the court rejected a proposed expansion of *Stanley*.

A three-judge court convened in the northern district of Georgia decided "to keep Stanley limited to its facts". *Gable* v. *Jenkins*, 309 F. Supp. 998, 1000 (N.D. Ga. 1969). This case was summarily affirmed at 397 U.S. 592 (1970).

There are a number of cases in which the rationale of *Stanley* has been construed more broadly than the three decisions referred to immediately above. Thus, in *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), *probable jurisdiction noted sub nom., Dyson* v. *Stein*, 396 U.S. 954 (1969), *restored to calendar for reargument*, 399 U.S. 922 (1970), a three-judge court asserted that it was "impossible" for the court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in Roth v. United States . . ." The court went on to say (p. 606):

> *Stanley* expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of "public action taken or intended to be taken with respect to obscene matter".

The court in *Stein* concluded that the Texas obscenity statute "as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination." (p. 607).

Another court which considered the impact of *Stanley* is *Karalexis* v. *Byrne*, 306 F. Supp. 1363 (D. Mass.) (1969), *probable jurisdiction noted*, 397 U.S. 985 (1970), *restored to*

calendar for reargument 399 U.S. 922 (1970). In that case, a three-judge district court reviewed an obscenity statute which prohibited importing, printing, distributing or possessing obscene matter. The court expressed its conclusion "that public distribution differed from private consumption" and that this distinction also applied to transportation. The court said, at p. 1366:

> . . . We think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned.

Another recent decision in which the court dismissed counts charging the transportation of obscene material is *United States* v. *Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970). There the court pointed to the absence of any legitimate governmental interest to justify regulation. Said the court (p. 425):

> The Supreme Court has recognized the protection of children and the protection of an unwilling public from obtrusive invasions of privacy as proper governmental interest justifying obscenity laws. But neither of these can be used to justify prohibiting mailings to a requesting adult. There is no public display, and children are not involved. No valid governmental interest remains, and the conclusion is inescapable that the government cannot constitutionally bring such a prosecution.

Another case in which a three-judge district court determined the breadth of *Stanley* is *United States* v. *Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (C.D. Calif. 1970). The United States Supreme Court has recently accepted this case for review. See 39 L.W. 3131. In *Thirty-Seven (37) Photographs*, the court invalidated 18 U.S.C. § 1305, stating (p. 37):

> It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive.

In *Lethe*, cited above, the court discussed the relationship

of the right to possess and the right to receive in these terms (p. 424):

> If the government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his home, then clearly it can have no greater interest in preventing him from acquiring them.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the court noted that since married couples have the right to use contraceptive devices, such right would be meaningless if a state could lawfully block such persons from receiving contraceptive devices and instruction. By analogy, it follows that with the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors.

Although this opinion has concerned itself primarily with *Stanley* and *Redrup* and the cases subsequent thereto which have attempted to apply those decisions, there are a number of other decisions which adopt an obtrusiveness approach. For example, as far back as the year 1948, in *Winters* v. *New York*, 333 U.S. 507, 515 (1948), the court spoke of "gross and open indecency or obscenity". The pandering theory, adopted in *Ginzburg* v. *United States*, 383 U.S. 463 (1966), would appear to be bottomed on the concept that brazen and public promotion of prurient material deprives it of its first amendment protection. In a dissenting opinion in *Ginzburg*, Justice Stewart spoke of (p. 498, Note 1):

> . . . an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it.

I am unable to accept the narrow interpretation of *Stanley* which the government would ascribe to it. I find more reasonable and impressive the analysis and interpretation adopted by the courts in *Stein* v. *Batchelor*, *Karalexis* v. *Byrne*, *United States* v. *Lethe*, and *United States* v. *Thirty-Seven* (*37*) *Photographs*. I find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes.

To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government's prerogatives; on its face, it forbids the transportation of obscene materials. Thus, it applies to non-public transportation in the absence of a special governmental interest. The statute is thus overbroad, in violation of the first and ninth amendments, and is therefore unconstitutional.

In view of the court's conclusion as stated above, the question whether scienter is an essential element of the offense need not be determined by the court.

Now, therefore, IT IS ORDERED that the defendant's motion to dismiss the indictment on the ground that 18 U.S.C. § 1462 is unconstitutional for its violation of the first and ninth amendments of the United States Constitution be and hereby is granted.

Dated at Milwaukee, Wisconsin, this 28th day of October, 1970.

MYRON L. GORDON,
United States District Judge.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

Case No. 70–CR–20

UNITED STATES OF AMERICA, *Plaintiff*

vs.

GEORGE JOSEPH ORITO, *Defendant*

Notice of Appeal

NOTICE IS HEREBY GIVEN that the Plaintiff, United States of America, hereby appeals to the Supreme Court of the United States pursuant to Section 3731, Title 18, United States Code, from the order of the District Court dismissing the instant Indictment on the ground that 18 U.S.C. 1462 is unconstitutional for its violation of the First and Ninth Amendments of the United States Constitution.

Dated at Milwaukee, Wisconsin, this 29th day of October, 1970.

/s/ DAVID J. CANNON,
United States Attorney.

SUPREME COURT OF THE UNITED STATES

No. 70–69 ....., October Term, 1971

UNITED STATES,
Appellant,

v.

GEORGE JOSEPH ORITO

APPEAL from the United States District Court for the Eastern District of Wisconsin.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 12, 1971

☆ U.S. Government Printing Office: 1971—448-599/279

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE JOSEPH ORITO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINION BELOW

The decision and order of the district court (Appendix A) is not yet reported.

JURISDICTION

On October 28, 1970, the United States District Court for the Eastern District of Wisconsin entered its decision and order (Appendix A) dismissing a one-count indictment based on 18 U.S.C. 1462, which prohibits the interstate transportation of obscene material by common carrier. The court dismissed the indictment on the ground that Section 1462 is overbroad on its face because it unconstitutionally extends the prohibition on interstate transportation of obscene ma-

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terials to those intended solely for privvate use (Appendix A, *infra*, p. 14). A notice of appeal to this Court was filed in the district court on October 29, 1970 (Appendix B, *infra*, p. 15). This Court has jurisdiction under 18 U.S.C. 3731 to review on direct appeal from a district court the dismissal of an indictment based upon the invalidity of the statute on which the indictment is founded. See, *e.g.*, *United States* v. *Spector*, 343 U.S. 169; *United States* v. *Petrillo*, 332 U.S. 1.[1]

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1462, which prohibits the interstate transportation by common carrier of obscene material irrespective of its intended use, is constitutional.

2. Whether, assuming that only transportation of obscenity for non-private purposes may be prohibited, the district court erred by considering a challenge to the statute on its face.

STATUTE INVOLVED

18 U.S.C. 1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film,

[1] The recent amendment to this section, providing for government appeal to the courts of appeals in circumstances such as this, applies only to cases begun in the district courts after January 2, 1971. See Reply Memorandum for the United States in *United States* v. *Brewster*, No. 1025, this Term.

paper, letter, writing, print, or other matters of indecent character; * * *

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

In an indictment filed in the United States District Court for the Eastern District of Wisconsin, appellee was charged with knowingly transporting in interstate commerce, by means of a common carrier, various specified copies of obscene materials in violation of 18 U.S.C. 1462. Appellee filed two motions to dismiss the indictment on the ground that Section 1462 is unconstitutional. One motion was based on the absence of a provision in the statute requiring proof of scienter. The other was based on the contention that the statute is overbroad because it prohibits interstate transportation of obscene material for solely personal use in violation of the First and Ninth Amendments to the Constitution.

The district judge dismissed the indictment on October 28, 1970. Relying primarily on this Court's decisions in *Redrup* v. *New York*, 386 U.S. 767, and *Stanley* v. *Georgia*, 394 U.S. 557, it concluded that the government's interest in controlling distribution or possession of obscenity was limited to preventing "pandering * * * or its exposure to children or to unwilling adults" (Appendix A, *infra*, p. 14). Since Section 1462

reaches beyond these situations to transportation for private use, the court ruled that it is unconstitutional on its face (*ibid.*). The court did not consider the scienter issue.

THE QUESTIONS ARE SUBSTANTIAL

This case is another in a series involving the question of the impact of *Stanley* v. *Georgia, supra,* on the federal obscenity laws. See, *e.g., United States* v. *Reidel,* No. 534, this Term, probable jurisdiction noted, October 12, 1970 (18 U.S.C. 1461) and *United States* v. *Thirty-seven (37) Photographs,* No. 133, this Term, probable jurisdiction noted, October 12, 1970 (19 U.S.C. 1305(a)). The decision below not only diminishes the authority of the United States to prohibit the interstate transportation of obscene material by common carrier but also casts doubt on various other federal and state statutes regulating distribution of obscene matter.

1. The views of the United States as to the impact of *Stanley* v. *Georgia, supra,* are fully set forth in our brief in *Thirty-seven (37) Photographs, supra,* and in our Brief as *amicus curiae* in *Byrne* v. *Karalexis,* pending on appeal, No. 83, this Term.[3] In essence, it is our position that *Stanley* held only that the government lacks the power to punish or bar possession of obscene material "in the privacy of a person's own home," 394 U.S. 564. It does not establish, as the court below concluded, an individual right to receive or distribute obscene matter, nor does it impair the validity

[3] We are providing copies of these Briefs to counsel for appellee.

of this Court's holding in *Roth* v. *United States*, 354 U.S. 476, that obscene material is not entitled to any First Amendment protection. Consequently, the decision does not affect the government's power to control distribution and possession of obscene material outside the home—in this case, its interstate transportation by common carrier.[3]

2. Even assuming that the government cannot punish transportation of obscenity for private use, we believe it is indisputable that it validly may prohibit interstate transportation of obscene material which is intended for public distribution and use. That being so, we contend that the district court erred in according standing to appellee to attack the statute on its face as overly broad. It should, instead, have awaited a factual determination of whether appellee intended private use or public distribution of the materials and then assessed the validity of the application of the statute to the materials in question.[4]

Our position on the question of standing to assert invalidity of a statute on grounds of overbreadth is set forth in our Brief in *Thirty-Seven* (*37*) *Photo-*

[3] Several lower federal courts have adopted essentially this interpretation. See *Miller* v. *United States*, 431 F. 2d 655 (C.A. 9), No. 1014, this Term, petition for a writ of certiorari filed November 27, 1970; *United States* v. *Fragus*, 428 F. 2d 1211 (C.A. 5); *United States* v. *Melvin*, 419 F. 2d 136 (C.A. 4); *Gable* v. *Jenkins*, 309 F. Supp. 998 (N.D. Ga.), affirmed, 397 U.S. 592.

[4] With respect to obscenity statutes, this Court has repeatedly approved the approach of determining their validity as applied rather than on their face. *E.g.*, *Ginzburg* v. *United States*, 383 U.S. 463; *Memoirs* v. *Massachusetts*, 383 U.S. 413; *Redrup* v. *New York*, 386 U.S. 767; see Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 884–887, 921–922 (1970).

graphs, supra. Basically, we contend that a statute must have elements of vagueness, as well as overbreadth, before an individual whose conduct could be constitutionally proscribed under a properly drawn statute—here, a person who transports obscene material for non-private purposes—has standing to challenge it on its face. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479, 490–492; *Thornhill* v. *Alabama,* 310 U.S. 88, 96–98.

It is vagueness and the consequent uncertainty as to the valid reach of a statute that justifies an expansive attitude toward standing. But the statute here is not vague. The distinction between intended private and public use is clear, and, consequently, the two classes to which the statute may apply are distinct. If application to a person who transports obscenity for private purposes is indeed unconstitutional, this defect in the statute can be cured, when such a person raises the issue, by a restrictive interpretation or by excising invalid portions of the statute. See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962); Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 907–910 (1970).

The district court, then, acted prematurely in dismissing the indictment for it is entirely possible, depending on the facts, that the statute might validly apply to appellee under any interpretation.[5]

[5] We note that appellee was convicted in the Central District of California of a similar violation involving a bulk shipment of obscenity where the proof clearly indicated that the material was intended for public distribution. See No. 313, *George Joseph Orito* v. *United States,* this Term, pending on petition for a writ of certiorari.

CONCLUSION

The resolution of the issues in this case may be governed by the decisions in *Reidel, supra,* and *Thirty-Seven (37) Photographs, supra.* It is respectfully submitted that this Court should defer disposition of the present appeal until after resolution of the appeals in those cases. Depending upon the outcome of those cases, the Court might find it appropriate either to note probable jurisdiction herein or to dispose of the instant case summarily.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
ROGER A. PAULEY,
ROBERT E. LINDSAY,
Attorneys.

JANUARY 1971.

APPENDIX A

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

No. 70-CR-20

UNITED STATES OF AMERICA, PLAINTIFF,

v.

GEORGE JOSEPH ORITO, DEFENDANT

Decision and Order

Two motions to dismiss the indictment are now before the court. In both motions, the defendant contends that 18 U.S.C. § 1462 is unconstitutional. One motion is based on the absence of any provision in the statute requiring proof of scienter; the other is based on the defendant's contention that the statue is overbroad and violates the first and ninth amendments in imposing criminal sanctions for the interstate transportation of obscene material which may be designed for personal use.

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scene materials without discriminating as to whether such materials are "pandered", exposed to children or imposed on unwilling adults.

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> It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive.

In *Lethe*, cited above, the court discussed the relationship of the right to possess and the right to receive in these terms (p. 424):

> If the government has no substantial interest in preventing a citizen from reading books and

watching films in the privacy of his home, then clearly it can have no greater interest in preventing him from acquiring them.

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> . . . an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it.

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Batchelor, Karalexis v. *Byrne, United States* v. *Lethe,* and *United States* v. *Thirty-Seven* (*37*) *Photographs.* I find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes.

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In view of the court's conclusion as stated above, the question whether scienter is an essential element of the offense need not be determined by the court.

Now, therefore, IT IS ORDERED that the defendant's motion to dismiss the indictment on the ground that 18 U.S.C. § 1462 is unconstitutional for its violation of the first and ninth amendments of the United States Constitution be and hereby is granted.

Dated at Milwaukee, Wisconsin, this 28th day of October, 1970.

MYRON L. GORDON,
United States District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

Case No. 70-CR-20

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GEORGE JOSEPH ORITO, DEFENDANT

Notice of Appeal

NOTICE IS HEREBY GIVEN that the Plaintiff, United States of America, hereby appeals to the Supreme Court of the United States pursuant to Section 3731, Title 18, United States Code, from the order of the District Court dismissing the instant Indictment on the ground that 18 U.S.C. 1462 is unconstitutional for its violation of the First and Ninth Amendments of the United States Constitution.

Dated at Milwaukee, Wisconsin, this 29th day of October, 1970.

/s/ DAVID J. CANNON,
United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1971

No. 1276

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

UNITED STATES OF AMERICA, *Appellant*

v.

GEORGE JOSEPH ORITO, *Appellee*

On Appeal From the United States District Court For The Eastern District of Wisconsin

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the decision and order by the district court on October 28, 1970 (Juris. St. 9-14) be summarily affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1462, which prohibits the interstate transportation by common carrier of obscene material, irrespective of its intended use, is unconstitutional because of its overbreadth.

2. Whether appellee had standing to challenge the statute on its face because of its overbreadth.

ARGUMENT

1. Section 1462 of Title 18, United States Code, in relatively clear language, proscribes the importation and transportation of obscene materials through the use of interstate commerce. The specific clause under which the appellee was charged prohibits the sole act of transportation or carriage of allegedly obscene materials. Appellee submits that such an unqualified prohibition of all forms of interstate transportation is patently unconstitutional in light of this Court's decisions in *Redrup v. New York,* 386 U.S. 767, and *Stanley v. Georgia,* 394 U.S. 557. The inescapable implication of those decisions is that conduct such as the transportation of obscene material is protected from governmental interference and criminal punishment.

It is appellee's position that *Stanley v. Georgia, supra,* established significant constitutional distinctions between openly public activity, on the one hand, and private or restricted activity in relation to obscenity, on the other. Given its narrowest interpretation, this Court held in *Stanley* that "mere private possession of obscene matter cannot constitutionally be made a crime." 394 U.S. at 559. However, the opinion further indicates that there is no legitimate governmental interest in regulating the use of obscene materials in most, if not all, private or restricted situations whether or not they involve possession in the home. Specifically, this Court noted that legitimate governmental interests in regulating obscenity come into play only where a danger arises of improper exposure of materials to juveniles or unconsenting members of the public (394 U.S. at 567):

> It is true that in Roth this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of anti-

> social conduct or would probably induce its recipients to such conduct. . . . But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York, supra,* or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York,* 386 U.S. 767, 769, 18 L. ed 2d 515, 517, 87 S. Ct. 1414 (1967). No such dangers are present in this case.

Thus, appellee submits that Section 1462 is patently overbroad and unconstitutional in that it

> does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. [*Thornhill v. Alabama,* 310 U.S. 88, 97]

First of all, Section 1462 is fatally overbroad because it can be applied to situations where the activities of private possession and transportation occur simultaneously. For example, may a person who carries obscene materials in his attaché case aboard a commercial airliner be punished under Section 1462?[1] The United States would have the protections of *Stanley* apply only to situations involving possession in the privacy of one's home. Appellee can only submit that the logic of *Stanley* hardly seems limited to the location of one's home. (Cf., *Katz*

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[1] See *United States v. Thirty-Seven (37) Photographs,* 309 F. Supp. 36 (C.D. Cal. 1970), No. 133, this Term, probable jurisdiction noted, October 12, 1970. There the party involved had carried allegedly obscene photographs in his personal luggage aboard a commercial airliner as he entered the United States. These photographs were subsequently seized by customs officials in the course of an inspection, pursuant to 19 U.S.C. 1305.

v. United States, 389 U.S. 347, 351.) It is appellee's position that this Court was just as concerned, if not more concerned, with the right of persons to receive information regardless of its social worth than with intrusions into the home. Section 1462 fails to exclude from its coverage those situations where the activities of private or personal possession and transportation occur simultaneously. The right to be free from unwanted governmental intrusions upon one's privacy in such situations is not protected as the section is presently constituted.

A second reason for the overbreadth of Section 1462 stems from the failure of the statute to define interstate transportation more precisely in terms of public distribution or commercial dissemination. Given its generally accepted meaning, the mere act of transportation or carriage of obscene materials in interstate commerce is an extremely private activity. The act of transportation itself cannot be said to in any way involve exposure of the materials to juveniles or to unconsenting adults. While *Stanley* indicates that legitimate governmental interests arise at the point of distribution, that does not permit governmental interference or punishment of a different act, i.e., transportation, which is essentially private in nature.[2] The fatal overbreadth of Section 1462 in this regard follows from the imprecise definition of the prohibited activity.

Thirdly, Section 1462 is overbroad because it fails to distinguish between instances of transportation for private or personal reasons and transportation for commercial or public reasons. The *Stanley* decision, at the very

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[2]This interpretation was essentially adopted by lower federal courts in *United States v. 4,400 Copies of Magazines,* 276 F. Supp. 904 (D. Md. 1967); *United States v. 127,295 Copies of Magazines, More or Less Entitled "Amor",* 295 F. Supp. 1186 (D. Md. 1968).

least, draws a constitutional distinction between commercial or public dissemination of obscene materials and non-public or private distribution. Referring to the *Roth* decision this Court stated (394 U.S. at 567): "But that case dealt with public distribution of obscene materials and such distribution is subject to different objections." Earlier in the opinion this Court stated (394 U.S. at 562): "Other cases dealing with non-public distribution of obscene material or with legitimate uses of obscene material have expressed similar reluctance to make such activity criminal, albeit largely on statutory grounds." By referring to the various fact situations of non-public distribution and commercial or public distribution, the *Stanley* decision at minimum, implies that interstate shipment or transportation of obscene materials for private, noncommercial purposes is protected activity.[8]

Finally, appellee submits that Section 1462 is also overbroad because it can be applied to instances of transportation of obscene materials for commercial purposes to requesting adults. Protection for this type of activity follows from the explicit reference in *Stanley* to the constitutionally-derived right to receive information and ideas regardless of their social worth. Moreover, this Court stated (394 U.S. at 565-566): "Our whole constitutional heritage rebels at the thought of giving Government the power to control men's minds." Obviously, one of the main concerns in the opinion involved the First Amendment right to obtain information and material even if considered obscene.

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[8]Several lower federal courts have adopted essentially this interpretation. See *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), reversed on other grounds, sub. nom. *Dyson v. Stein*, No. 41, this Term, February 23, 1971; *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970); *United States v. Dellapia*, No. 34858 (2 Cir., Oct. 20, 1970).

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive. . . ." *Martin v. City of Struthers,* 319 U.S. 141, 143, 87 L. ed 1313, 1316, 63 S. Ct. 862 (1943); see *Griswold v. Connecticut,* 381 U.S. 479, 482, 14 L. ed 2d 510, 513, 85 S. Ct. 1678 (1965); *Lamont v. Postmaster General,* 381 U.S. 301, 307-308, 14 L. ed 2d 398, 402, 403, 85 S. Ct. 1493 (1965) (Brennan, J., concurring); Cf. *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L. ed 1070, 45 S. Ct. 571, 39 A.L.R. 468 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York,* 333 U.S. 507, 510, 92 L. ed 840, 847, 68 S. Ct. 665 (1948), is fundamental to a free society. [394 U.S. at 564.]

Thus, appellee submits that if *Stanley* has firmly established the right to possess obscene material and the correlative right to receive such information regardless of its social worth, then the right to transport or distribute such materials necessarily follows.[4]

While the Government's position apparently would permit private possession of obscene materials in the home, it would nevertheless punish the only means of gaining possession. If *Stanley* has established a protected right of a person to possess materials in the home, the

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[4] Several decisions of this Court have inferred a correlative right of distribution from a right to receive informational material. See *Martin v. City of Struthers,* 319 U.S. 141, 143; *Winters v. New York,* 333 U.S. 507, 510; *Griswold v. Connecticut,* 381 U.S. 479, 482; Cf., *Crane v. Campbell,* 245 U.S. 304.

distributor or supplier must be protected in providing those materials.[5]

2. In its jurisdictional statement the United States challenges the standing of the appellee to attack Section 1462 on its face as overly broad. From the foregoing argument it should be clear that the appellee attacks the statute as overbroad not only because of possible applications in hypothetical situations, but also because of its actual application to the appellee. Appellee was indicted for the sole act of transportation or shipment of obscene materials in interstate commerce, without any allegation that the allegedly obscene materials would be distributed commercially, disseminated to juveniles, or foisted upon the public. Appellee clearly has standing to assert that all transportation is protected activity because of its private nature.

However, appellee also submits that the district court correctly scrutinized possible applications of Section 1462 without regard to the particular constitutional status of the appellee's conduct. See *Thornhill v. Alabama,* 310

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[5]Several lower federal courts, besides the court below, have adopted essentially this interpretation. See *Karalexis v. Byrne,* 306 F. Supp. 1368 (D. Mass. 1969), reversed on other grounds, sub. nom. *Byrne v. Karalexis,* No. 83, this Term, (February 23, 1971); *United States v. Thirty-Seven Photographs, supra; United States v. Lethe,* 312 F. Supp. 421 (E.D. Cal., 1970); *United States v. Langford,* 315 F. Supp. 472 (D. Minn. 1970); *United States v. B & H Dist. Corp.,* 319 F. Supp. 1231 (W.D. Wis. 1970), No. 1383, this Term, 1970, jurisdictional statement filed February 23, 1971; *Hayse v. Van Hoomissen,* 321 F. Supp. 642 (D. Ore., 1970), No. 1387, this Term, appeal docketed February 12, 1971; *United States v. Reidel,* No. 5845-HP-CR (C.D. Cal., June 8, 1970) No. 534, this Term, probable jurisdiction noted, October 12, 1970; *United States v. Thirty-Five MM. Motion Picture Film "Language of Love",* 432 F. 2d 705 (2 Cir. 1970), No. 1009, this Term, certiorari granted February 22, 1971.

U.S. 88, 98; *Terminiello v. Chicago,* 337 U.S. 1; *Kunz v. New York,* 340 U.S. 290; *N.A.A.C.P. v. Button,* 371 U.S. 415; *Aptheker v. Secretary of State,* 378 U.S. 500; *Dombrowski v. Pfister,* 380 U.S. 479.

CONCLUSION

Appellee submits that the fatal defect in Section 1462 stems from the imprecision of the language contained therein. Clearly, the Government has no substantial or legitimate interest in proscribing all interstate transportation of obscene materials. Appellee has set forth those instances with supporting authority where similar conduct has been found to be protected under the First and Fourteenth Amendments to the United States Constitution. For this reason it is submitted that the action of the Court below was well founded in law, reason and policy and should be summarily affirmed by this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-69

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE JOSEPH ORITO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion and order of the district court (App. 5-9) is unreported.

JURISDICTION

On October 28, 1970, the United States District Court for the Eastern District of Wisconsin entered an order (App. 5-9) dismissing a one-count indictment against appellee which charged the transportation of obscene material by means of a common carrier in violation of 18 U.S.C. 1462. The court's ruling was based on its view that Section 1462 was unconstitutionally overbroad because it barred the transportation of obscene materials which are intended for pri-

vate use (App. 9). A notice of appeal to this Court under 18 U.S.C. 3731 was filed in the district court on October 29, 1970 (App. 10). Probable jurisdiction was noted by this Court on October 12, 1971 (App. 11). This Court has jurisdiction under 18 U.S.C. (1964 ed.) 3731 to review on direct appeal a district court dismissal of an indictment based upon the invalidity of the statute on which the indictment is founded. See *e.g., United States* v. *Spector,* 343 U.S. 169; *United States* v. *Petrillo,* 332 U.S. 1.[1]

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1462, which prohibits the interstate transportation by common carrier of obscene material, can constitutionally be applied where the transportation is for personal use.

2. Whether, assuming *arguendo* that transportation of obscenity for personal use may not be prohibited, the district court erred by considering and sustaining a challenge to the statute on its face.

STATUTE INVOLVED

18 U.S.C. 1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

[1] The recent amendment to 18 U.S.C. 3731, providing for government appeal to the courts of appeals in circumstances such as this, applies only to cases begun in the district courts after January 2, 1971.

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; * * *

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

In a one-court indictment filed in the United States District Court for the Eastern District of Wisconsin, appellee was charged with having knowingly transported in interstate commerce, by means of a common carrier, various specified copies of obscene materials, in violation of 18 U.S.C. 1462 (App. 1–2). The indictment charged the transportation of over 80 reels of film, many of which are duplicates. Appellee filed two motions to dismiss the indictment on the ground that the statute was unconstitutional. One motion was based on the absence of a provision in the statute requiring proof of *scienter*. The other motion was based on the contention that the statute was overbroad because it reaches the interstate transportation of obscene materials for solely personal use in violation of the First and Ninth Amendments (App. 3–4).

Relying primarily upon this Court's decisions in *Stanley* v. *Georgia*, 394 U.S. 557, and *Redrup* v. *New York*, 386 U.S. 767, the district court dismissed the indictment (App. 5–9). The court reasoned that those

cases, and certain other lower court decisions (*e.g. United States* v. *Lethe,* 312 F. Supp. 421 (E.D. Cal.)), established that the government's interest in controlling the distribution or possession of obscenity was limited to preventing "pandering * * * or its exposure to children or to unwilling adults" (App. 9). Since, however, Section 1462 prohibits transportation irrespective of its intended purpose and thus reaches transportation for personal use, the court ruled that the statute was unconstitutional on its face (*ibid.*). The court did not consider the *scienter* issue.

SUMMARY OF ARGUMENT

I

The court below proceeded on the assumption that since *Stanley* v. *Georgia,* 394 U.S. 557, protected the right to possess obscene material in the privacy of one's own home, there was also a constitutionally protected right to obtain it. On this theory it found 18 U.S.C. 1462 facially unconstitutional since the statute reached material transported by a common carrier for personal use. This view misconceives the thrust of *Stanley,* in overlooking the holding of *Roth* v. *United States,* 354 U.S. 476, and its progeny that obscenity is not protected by the First Amendment. It is also contrary to the recent decisions in *United States* v. *Reidel,* 402 U.S. 351, and *United States* v. *Thirty-Seven* (*37*) *Photographs,* 402 U.S. 363, which reaffirmed the established proposition that there is no right to purchase obscene material.

Stanley does not protect the transportation of obscene material. That decision rested upon the right of the individual to be free from government intrusion into his home and private thoughts even when he is in possession of obscenity. It did not grant First Amendment protection to obscene material *per se* or create a zone of privacy to protect that material in transit because it is allegedly being transported for private use. The crucial distinction between the individual's rights to privacy in his home and library, and the privacy of obscene material in locations outside his personal abode, whether it be a common carrier or a port of entry, was expressly recognized in *Reidel* and *Thirty-Seven (37) Photographs*. Both cases held that in the latter contexts no rights of privacy like those in the home obtain, but rather that in those contexts obscenity is subject to governmental control. In short, whatever the intended use of the obscene material, the material itself is not constitutionally protected from governmental seizure or prosecution as it proceeds to its intended location. The district court thus erred in holding 18 U.S.C. 1462 unconstitutional.

Any other rule might impair the interests protected by governmental control of commercial transportation of obscene material. Protecting transportation for personal use from governmental control might result in the intrusion of the obscene material upon an unwilling recipient by inadvertent exposure through a misdelivered shipment or other accident. Moreover, it would often be very difficult to distinguish between materials shipped for private use and those

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shipped for commercial exploitation. To allow the issue to turn upon the claim of the shipper would chance the real danger of rewarding those who, despite their protestations to the contrary, in fact plan commercial distribution. The prohibition of transportation for private use is thus necessary to render the bar against commercial distribution effective. Moreover, such control is consistent with this Court's decisions; it does not restrict protected speech nor does it interfere significantly with rights of privacy.

II

In any event, the district court acted improperly in striking down the statute as invalid on its face. Even if it cannot constitutionally be applied to transportation for private use, it is clearly constitutional as applied to transportation for commercial purposes, and, as *Thirty-Seven (37) Photographs* holds, the possibility of overbreadth in reaching transportation for private use would not make the statute invalid in all its applications. Those who transport for commercial purposes need not be afforded standing to raise the rights of those who transport for private use, since this is not a case where there is a danger of vagueness and "chilling effect." See, *e.g. Dombrowski v. Pfister,* 380 U.S. 479. If the statute is overbroad, that overbreadth can be simply cured, probably in a single criminal prosecution, since there is a clear conceptual line between commercial distribution and transportation for private use. Whatever the rule as to the latter, the former type of distribution is clear-

ly subject to governmental control. Thus, assuming that transportation for private use is protected, whether the statute may be validly applied to appellee would depend on whether it was determined at trial that his purpose was commercial or private. There was no reason in these circumstances for the court to move prematurely and strike down the entire statute.

ARGUMENT

I

CONGRESS HAS THE POWER, WHICH IT EXERCISED IN 18 U.S.C. 1462, TO PROHIBIT THE INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL REGARDLESS OF ITS INTENDED USE.

Relying upon a broad interpretation of *Stanley* v. *Georgia*, 394 U.S. 557—that the right to read obscene materials in the privacy of one's own home implies the right to receive such materials—the district court struck down the statute involved here because it could be applied to bar transportation of obscene materials for personal use.[2] The court could "find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes" (App. 8). There are, however, dispositive distinctions between the two activities, many of which were expli-

[2] Presently before the Court is the related question whether Congress has the power to prohibit importation of obscene matter for private use. See *United States* v. *Twelve 200-ft. Reels of Super 8 mm. Film, et al.*, No. 70-2, probable jurisdiction noted June 21, 1971, 403 U.S. 930.

cated by this Court in *United States* v. *Reidel*, 402 U.S. 351, and *United States* v. *Thirty-Seven* (*37*) *Photographs*, 402 U.S. 363, both decided after the district court's decision in this case. These distinctions justify reversal here and the sustaining of the constitutionality of the statute.

A. In *Reidel*, this Court held that Congress may constitutionally preclude the use of the mails for the distribution of obscene material even to willing recipients who state that they are adults. In *Thirty-Seven* (*37*) *Photographs*, the Court sustained the power of the government to prohibit the commercial importation of pornography into this country. These decisions confirmed the import of numerous earlier decisions, *e.g.*, *Roth* v. *United States*, 354 U.S. 476; *Manual Enterprises* v. *Day*, 370 U.S. 478; *Ginzburg* v. *United States*, 383 U.S. 463, that there is no constitutional right to purchase obscene material. As this Court stated in *Reidel*, 402 U.S. at 354: "Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned." And again "*Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today." *Id.* at 356. In *Thirty-Seven* (*37*) *Photographs*, the Court pointed out that in *Reidel* it had held "that Congress may constitutionally prevent the mails from being used for distributing pornography" (402 U.S. at 376). In short, both decisions recognized and reaffirmed the central principle of *Roth* that "obscenity is not within the area of constitutionally protected speech or press" 354 U.S. at 485.

Reidel and *Thirty-Seven* (*37*) *Photographs* make plain that there is no First Amendment right to sell or purchase obscene material, nor any right to distribute obscenity. Thus there can be no doubt that Section 1462 is constitutional to the extent that it reaches the interstate transportation by a common carrier of obscene material intended for commercial distribution.[3] The lower court here has acknowledged as much (App. 9). We submit that it is equally plain that the statute is constitutional as applied to transportation for private purposes. The contrary view adopted below rests essentially upon an overly broad reading of *Stanley* v. *Georgia*—a reading rejected both by *Reidel and Thirty-Seven* (*37*) *Photographs*.

B. In *Stanley* v. *Georgia*, 394 U.S. 557, state agents entered the home of Mr. Stanley under a search warrant which authorized them to seize evidence of bookmaking. In the course of the search, they discovered a roll of motion-picture film and a projector. They viewed the film, concluded that it was obscene, and arrested Stanley. He was convicted under state law for "knowingly hav[ing] possession of * * *

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[3] Several lower federal courts have upheld the constitutionality of 18 U.S.C. 1462. See *Miller* v. *United States*, 431 F. 2d 655, 657 (C.A. 9), pending on a petition for a writ of certiorari, No. 70-43, this Term (constitutional, as applied to commercial distribution); *United States* v. *Fragus*, 422 F. 2d 1244 (C.A. 5) (constitutional, without reference to purpose of transportation); *United States* v. *Melvin*, 419 F. 2d 136, 139 (same); United States v. *Thevis*, 320 F. Supp. 713, 715 (N.D. Ga.) (statute is constitutionally valid in the context of commercial distribution). See also *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D. D.C.), affirmed, 390 U.S. 457 (sustaining the venue provisions of 18 U.S.C. 1461 and 18 U.S.C. 1462).

obscene matter." *Stanley* v. *Georgia, supra,* 394 U.S. at 558. This Court reversed, holding that the "First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." 394 U.S. at 568. As we pointed out in the Brief for the United States in *United States* v. *Twelve 200-ft. Reels of Super 8 mm. Film, et al.*, No. 70–2, this Term, pp. 8–11, we view *Stanley* essentially as vindicating the right of personal privacy in the confines of one's home and not as protecting the materials possessed or granting a right to obtain such materials. The decision was thus grounded on a combination of the Fourth Amendment proscription of "unwanted governmental intrusions into one's privacy" (*id.* at 564) and the First Amendment prohibition of governmental "control [over] the moral content of a person's thoughts" (*id.* at 565). The power of the government to regulate obscenity "does not extend," the Court concluded in *Stanley*, "to mere possession [of obscenity] by the individual in the privacy of his own home" (*id.* at 568). The focus of the decision was on "the right [of an individual] to satisfy his intellectual and emotional needs in the privacy of his own home" and "the right to be free from state inquiry into the contents of his library." *Stanley* v. *Georgia, supra,* 394 U.S. at 565. Quoting Mr. Justice Brandeis' language about "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 478), the Court in *Stanley* noted

that "fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia, supra,* 394 U.S. at 564. The central thought of *Stanley* is that the values protected by the First Amendment, the Fourth Amendment, and other provisions of the Bill of Rights (cf. *Griswold* v. *Connecticut,* 381 U.S. 479), would be endangered by the necessarily intrusive inquiry required to determine whether the contents of a man's library included obscene material.

To be sure, *Stanley* refers to a "right to receive information and ideas, regardless of their social worth" (394 U.S. 564). But in the context of that case, that meant only that the homeowner had a right to receive obscene material in his own home without subjecting his home to a search and without subjecting himself to prosecution for such possession. It did not mean that material outside the home is protected simply because the alleged purpose is to bring it into the home for private use.

Both *Reidel* and *Thirty-Seven* (*37*) *Photographs* have recognized this crucial distinction. In *Reidel* the Court noted the irrelevancy of *Stanley* to those "who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home." (402 U.S. at 355).[4] In *Thirty-Seven* (*37*) *Photo-*

[4] In his concurring opinion in *Reidel*, Mr. Justice Harlan stated in this regard (402 U.S. at 359–360): "* * * the 'right to receive' recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing upon the privacy

graphs, the plurality opinion of Mr. Justice White pointed out that "a port of entry is not a traveler's home" and *Stanley* does not "extend to one seeking to import obscene materials from abroad, whether for private use or public distribution" (402 U.S. at 376). What these decisions underscore is that the right upheld in *Stanley* to be free from governmental interference with the possession of obscenity in the home does not create a right to override governmental power in order to obtain obscene material. As far as obscene material is concerned, the rights one enjoys in the home are not the same as those enjoyed elsewhere.

C. As the foregoing discussion has shown, the most recent decisions of this Court construing *Stanley* have recognized what is implicit in that decision itself—that the right of privacy that decision protects does not include the right to obtain obscene material to satisfy a private interest. Accordingly there is no constitutional right to transport obscene material even for a private use and Section 1462 is therefore constitutional as applied to such transportation of obscenity. Just as "a port of entry is not a traveler's home" (*Thirty-Seven (37) Photographs, supra* 402 at 376), neither is a common carrier employed to transport obscene material a zone of privacy protected by the First Amendment. *Stanley* did not purport to deal with the congressional power to regulate the interstate transportation of obscene material by a common car-

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of a man's thoughts; rather, it is a right to a protective zone ensuring the freedom of a man's inner life' be it rich or sordid."

rier. See *United States* v. *Melvin, supra,* 419 F. 2d at 139.

We, of course, recognize that the surrender of property to a common carrier does not forfeit the individual's right of privacy in that property. See, *e.g., Corngold* v. *United States,* 367 F. 2d 1, 7 (C.A. 9).[5] But that privacy is not comparable to the interests protected by *Stanley.* A common carrier is not a private enclave where one enjoys the right to be let alone. Prosecution for possession of obscene material intended for personal use, which is being transported by common carrier, thus does not raise the specter of a gross intrusion into the privacy of a man's home and his library which is at the core of *Stanley.*[6]

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[5] The privacy of materials being transported by common carrier is not absolute and certainly not as inclusive as the right attaching to materials possessed in the home since the tariffs of most common carriers (if not all) include a right of inspection.

[6] In *Redmond* v. *United States,* 384 U.S. 264, we informed this Court that, in cases involving the sending of obscene materials through the mails (18 U.S.C. 1461), it is not the policy of the government, absent aggravating circumstances such as the defendant being a repeat offender, to institute prosecution when purely private correspondence (in that case a husband and wife, mailing to each other films of themselves in the nude) is involved. This, however, was not a concession of constitutional magnitude. We note, moreover, in this respect that appellee has been convicted in the Central District of California of a similar violation involving a bulk shipment of obscenity where the proof clearly indicated that the material was intended for public distribution. See No. 313, *George Joseph Orito* v. *United States,* O.T. 1970, certiorari denied, 402 U.S. 987. The facts, with respect to the public or private nature of the instant shipment, have not yet been developed in the district court.

Congress has long exercised the power to exclude noxious articles from the channels of commerce (see, *e.g.*, *Ex parte Jackson*, 96 U.S. 727; *Hoke* v. *United States*, 227 U.S. 308). As both *Reidel* and *Thirty-Seven* (*37*) *Photographs* make clear, nothing in *Stanley* suggests that this power may not be used to bar obscene materials, which are concededly outside the protection of the First Amendment, even though those materials are intended for purely personal use. What this Court said in *Thirty-Seven* (*37*) *Photographs* has application here: "That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce." 402 U.S. at 376. By the same token, interstate transportation of obscene material is not constitutionally immune from prosecution simply because the purpose may be to transport it to a home for personal use.

It is further important to note that excluding such material, irrespective of its intended use, from the channels of commerce decreases the risk that such material will intrude on the sensibilities of an unwilling recipient—for example, a traveler picking up the wrong bag, a person receiving a misdelivered package, or those near a shipment that breaks open.[7]

[7] Such an intrusion upon the sensibilities of another might also occur during inspection of a package. Cf. *Rowan* v. *Post Office*, 397 U.S. 728, in which this Court concluded that a householder could refuse to receive material that he considered to be obscene. We also note that prohibiting the interstate transportation of obscene material, which is solely intended for private

Even the court below recognized that the government has a "substantial and valid interest" to prevent the exposure of obscene materials to children and non-consenting adults (App. 9).

There is a related reason to uphold the statute as it applies to transportation for personal use. It is frequently extremely difficult to differentiate between what is intended for private and public dissemination. The same material can be used to serve either purpose. A small quantity of obscene material may very well be reproduced in sufficient quantity for commercial distribution. Nor should resolution of the issue turn on whether a claim is made of private use. For this could reward those who plan commercial distribution, but are disingenuous enough to say material is for private use and clever enough to transport it in a manner that makes the claim plausible. The upshot could be serious interference with the application of the statute to the concededly valid area of transportation for a commercial purpose. See Brief for the United States in *United States* v. *Twelve 200-ft. Reels of Super 8 mm. Film*, No. 70–2, this Term, pp. 15–18.

In sum, as *Reidel and Thirty-Seven (37) Photographs* have made clear, obscenity is outside the protection of the First Amendment, and the need for privacy in the confines of one's home which persuaded the Court

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use, by common carrier will not prevent all interstate transportation of such material. Thus, it remains possible to transport such material by private vehicle. 18 U.S.C. 1465, which prohibits interstate transportation of obscene material irrespective of the mode of transportation used, applies only to transportation for the purpose of "sale or distribution."

in *Stanley* v. *Georgia, supra,* does not carry beyond the portals of that private enclave. It is our submission therefore that the district court erred in dismissing the indictment on the ground that Congress may not prohibit under 18 U.S.C. 1462 the interstate transportation by common carrier of obscene material intended for private use.

II

THE DISTRICT COURT ERRED IN DECLARING THE STATUTE UNCONSTITUTIONAL ON ITS FACE

The district court declared the statute unconstitutional in all its applications on the ground that it was overbroad in reaching transportation for personal use. In *Thirty-Seven (37) Photographs,* this Court rejected a virtually identical attack on the statute forbidding importation of obscene materials. 402 U.S. at 375 n. 3 (plurality opinion of White, J.), 377–378 (concurring opinion of Harlan, J.), 378–379 (concurring opinion of Stewart, J.). Even assuming *arguendo* that the statute is invalid as applied to private transportation, or some forms of private transportation, persons transporting obscenity for commercial purposes may not assert those rights in behalf of their own, quite different activities.

We recognize that when First Amendment freedoms have been involved, this Court has relaxed to some extent traditional rules of standing (see, *e.g., United States* v. *Raines,* 362 U.S. 17, 21), and has "allowed attacks on overly broad statutes with no requirement that the person making the attack dem-

onstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432–433; *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98. The reason for this relaxed rule of standing is the possible "chilling effect" such statutes might have on the exercise of First Amendment rights. Permitting individuals to attack such a statute, irrespective of its application to their particular activity, is a means of lessening the prospect that persons whose activity is constitutionally protected will refrain from exercising their rights for fear of criminal sanction. See *Thornhill* v. *Alabama, supra,* 310 U.S. at 97–98; *Dombrowski* v. *Pfister, supra,* 380 U.S. at 486–487. But these concerns have relevancy in the situation where the proper construction of the statute can be determined only after a series of criminal prosecutions. "[T]hose affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others" *Dombrowski* v. *Pfister,* 380 U.S. 479, 491. This piecemeal construction results when the statute is both vague and overbroad. See, *e.g., Thornhill* v. *Alabama, supra; Dombrowski* v. *Pfister, supra.* It is only in that circumstance where "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution" (*Dombrowski* v. *Pfister, supra,* at 491), that one whose conduct might be validly proscribed

under a narrow interpretation may challenge the statute as unconstitutional on its face. See, *e.g.*, *Dombrowski* v. *Pfister*, *supra*, 380 U.S. at 490–492; *Baggett* v. *Bullitt*, 377 U.S. 360, 378. That is not the case here. The present statute is clearly not unconstitutionally vague in its designation of what materials may not be transported. That issue was settled by *Roth*, where this Court held the term "obscene" to be not impermissibly vague. *Roth* v. *United States*, *supra*, 354 U.S. at 491–492. Hence, even if it were unconstitutionally overbroad because it reaches transportation for private use, the instant statute is susceptible of being clearly limited to constitutional applications, probably in a single case. See *United States* v. *Thirty-Seven* (*37*) *Photographs*, *supra*, 402 U.S. at 375, n. 3; *id.* at 377–378 (Harlan, J., concurring); *id.* at 379 n. 1 (Stewart, J., concurring). Cf. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 858–860, 862–863, 908–910 (1970).

Irrespective of the constitutionality of Section 1462 as applied to transportation for private use, it is clear that the government may validly prohibit transportation of obscenity for commercial purposes. The decisions last term in *Reidel*, *supra*, and *Thirty-Seven* (*37*) *Photographs*, *supra*, merely reaffirmed the thrust of earlier cases, recognizing that principle. Indeed, in *Stanley* v. *Georgia*, *supra*, 394 U.S. at 568, itself, this Court explicitly stated that "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend

to mere possession by the individual in the privacy of his own home."

The distinction between transportation of obscenity for commercial purposes and that for personal use is sufficiently clear to remove any uncertainty regarding the reach of the statute. See *United States* v. *Thirty-Seven (37) Photographs, supra,* 402 U.S. at 377 (concurring opinion of Mr. Justice Harlan). There is consequently no reason to permit one engaged in commercial transportation, activity which is the "sort of 'hardcore' conduct that would obviously be prohibited under any construction" of the statute, *Dombrowski* v. *Pfister, supra,* 380 U.S. at 491–492, to escape application of the statute to him by challenging the validity of its possible application to other situations.

In this case the district court, even if it correctly believed that as applied to transportation for personal use the statute was unconstitutional, could have eliminated any overbreadth without the need to strike down the statute by restricting its application to transportation for commercial purposes, and the nature of petitioner's transportation could have been ascertained at trial.[8] Instead of declaring the entire statute unconstitutional, the court should have determined whether the statute could be validly applied to the

[8] Since the indictment charges appellee with having transported a large number of obscene films, many of which were duplicates (App. 1–2), there appears a fair likelihood that transportation was not for personal use.

type of transportation appellee was engaged in.[9] Cf. *United States* v. *Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191, 196–197 (S.D.N.Y.), probable jurisdiction noted, 402 U.S. 971, dismissed pursuant to Rule 60, 403 U.S. 942.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded with directions to reinstate the indictment.

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NOVEMBER 1971.

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[9] Last term in a very similar case, *United States* v. *B. & H. Distributing Corp., et al.*, 403 U.S. 927, this Court, on June 21, 1971, vacated the judgment and remanded for reconsideration in light of the decisions in *United States* v. *Reidel*, *supra*, and *Thirty-Seven (37) Photographs*, *supra*. In that case, the district court had dismissed an indictment drawn under the statute at issue here on the ground that Section 1462 was unconstitutionally overbroad because it fails to distinguish between transportation which presents danger to minors or the danger of intrusion upon unwilling recipients and transportation which does not present those dangers. 319 F. Supp. 1231, 1236–1237 (W.D. Wis.).

U.S. GOVERNMENT PRINTING OFFICE: 1971

No. 70-69

IN THE

Supreme Court of the United States

October Term, 1971

UNITED STATES OF AMERICA, *Appellant*

v.

GEORGE JOSEPH ORITO, *Appellee*

On Appeal from the United States District Court for The Eastern District of Wisconsin

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATUTES INVOLVED

18 U.S.C. §1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce —
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character. . . .

18 U.S.C. §1465 provides in pertinent part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribu-

tion any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

19 U.S.C. §1652 provides:

If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby.

33 U.S.C. §950 provides:

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Section 18, Act June 25, 1948, C. 645, 62 Stat. 683, 859-862 provides:

If any part of Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, shall be held invalid the remainder shall not be affected thereby.

SUMMARY OF ARGUMENT

Section 1462 of Title 18, United States Code, imposes criminal sanctions upon one who transports obscene materials across state lines by means of a common carrier. Section 1465 of Title 18, United States Code, provides the same penalty for one who transports obscene materials across state lines for the purpose of distribution or sale.

Appellee was indicted for a violation of Section 1462; the indictment alleged that he carried eighty-three obscene films on the airlines from San Francisco to Milwaukee. The United States District Court for the Eastern District of Wisconsin held that Section 1462 permitted the imposition of criminal sanctions upon conduct protected by the First Amendment and declared the statute to be void. The Government appealed from the dismissal of the indictment.

Stanley v. Georgia, 394 U.S. 557 (1969), held that the First Amendment protects the right of an individual to enjoy obscene materials in the privacy of his home and that the private possession of such materials cannot be made a criminal offense. Appellee argues that *Stanley* protects the private possession of obscene materials regardless of where they are possessed, as long as the possession does not entail a serious threat that minors or unwilling adults will be exposed to the materials.

Section 1462 prohibits possessory transportation. The likelihood that materials being carried by common carrier will inadvertently fall into the hands of minors or sensitive adults is no greater than that Stanley's collection would fall into their hands.

Appellee illustrates the unconstitutional sweep of Section 1462 with hyphotheticals which he asserts are protected by *Stanley*. The rationale of *Stanley* is that private use and enjoyment is protected and that for this reason a possession necessarily incident to this use is protected as well. From this logic appellee concludes that one who reads an obscene book on a commercial airline is protected, provided he does not display this book to minors or to adults who might be offended. Similarly, the actual possession of an obscene book in the pocket of an interstate traveler is protected as an incident of his intended personal enjoyment. It does not extend the holding of *Stanley* to likewise protect the possession of an interstate traveler when the obscene materials are in his luggage rather than his pocket. And finally, *Stanley* protects the individual who ships his collection of obscene materials from his residence in one state to his residence in another, or who entrusts his obscene materials to a moving company as he moves his household effects from an old residence to a new residence. Each of these examples illustrates a circumstance in which a protected possession would fall within the ambit of Section 1462.

The Government concedes the possible application of Section 1462 to a private possessory transportation, but urges that this Court should not reach the overbreadth issue. It argues at the outset that appellee's prior conviction for a violation of Section 1462 and the number of films involved permit the inference that appellee was engaged in the sale or distribution of these films, and that since his conduct is not protected by *Stanley*, he cannot assert the rights of those whose conduct would be protected.

The Government would distinguish the line of cases which have given standing to persons whose conduct

could have been prohibited by a more narrowly drawn statute on the grounds that a single prosecution and interpretation of Section 1462 could limit its scope to noncommercial possessory transportation. It overlooks the fact that such a construction would create a new element of the offense, and that such a construction is neither supported by Congressional history nor authorized by the severability provisions of Title 18. Unless this Court were to render an advisory opinion covering each of the illustrations suggested by appellee, as well as those illustrations not thought of by appellee, individuals would remain in doubt whether a given private possession of obscene materials was protected by the First Amendment.

If this Court concludes that appellee cannot challenge the overbreadth of Section 1462 because a single limiting construction of the Section will save its constitutionality and will not thereby create an offense which was not enacted by Congress, then appellee urges that his conduct on the state of this record is protected and that the statute must be construed to protect his rights.

As a final argument, the Government urges that even if appellee has standing and even if the statute is overbroad, this Court should interpret Section 1462 to apply only to transportation for purposes of sale or distribution. Appellee asserts that such a construction would create a new offense not contemplated by Congress in the enactment of Section 1462. Such a construction would create insurmountable problems of proof and would require the creation of some sort of presumption similar to that which appears in Section 1465. It is not as though Congress was unaware of the implications of prohibiting private possessory transportation. Precisely such cir-

cumstances were considered when Section 1465 was enacted. Had Congress wished to restrict the transportation of Section 1462 to the commercial transportation prohibited in Section 1465, it could have done so when Section 1462 was amended in 1970. Congress apparently intended that Section 1462 encompass private possessory transportation; in the face of this intent, a rewriting of the statute by this Court would be inappropriate.

As a second argument, appellee asserts that Section 1462 violates a right of privacy guaranteed by the Ninth Amendment. He views the Ninth Amendment as protecting all possession of obscene materials whether for purposes of sale or not, and urges that only a compelling governmental interest in this possession will warrant the creation of a federal crime which imposes sanctions upon it. In this context appellee distinguishes those cases which have held that the mails may not be used for the commercial distribution of obscene materials and those which hold that no one has the right to import obscene materials for the purpose of commercial distribution. In each of such cases the Government has a compelling interest in preventing the use of its own facilities for the business of purveying pornography. The mere possession of obscene materials for sale or the possessory transportation of obscene materials for sale is conduct in which the federal government has no significant interest. The moral fabric of the community is a matter peculiarly within the police powers of the states. *Roth v. United States,* 354 U.S. 476, 504-505 (1957) (Harlan, J., dissenting in part).

While a state might create an offense proscribing possession of obscene materials for sale justifying the offense on the grounds that such materials might be harmful,

a substantially greater showing of harm must be made before Congress can impose criminal sanctions upon the transportation in interstate commerce of the purportedly noxious materials.

Oregon has accepted the invitation of this Court in *Reidel* and effective January 1, 1972 adults in Oregon may purchase, sell and view obscene materials provided the exhibition or distribution is not conducted in a manner which offends those who do not wish to be exposed to this material. Section 1462 effectively prevents Oregon from experimenting with this legislation. The right of the people of Oregon to view communicative materials regardless of their obscenity is practically foreclosed by statutes which prevent the shipment of these materials into the state.

Appellee recognizes that the right to be let alone is not an absolute right, but asserts that in this circumstance he has a right to be let alone by the federal government regardless of whether a valid state statute could regulate his conduct. When the conduct of an individual is restricted by a criminal statute enacted by a sovereignty which has no legitimate interest in preventing such conduct, the Ninth Amendment is offended.

ARGUMENT

I. SECTION 1462 IS VOID FOR OVERBREADTH.

A. Section 1462 is Overboard Because It Can Be Applied to Interstate Transportation of Obscene Material for Personal Use.

The decisions of *United States v. Reidel*, 402 U.S. 351 (1971), and *United States v. Thirty-Seven (37)*

Photographs, 402 U.S. 363 (1971), leave many questions unanswered. Just as it appears that *Stanley v. Georgia*, 394 U.S. 557 (1969), concerned itself only with the private possession of obscene material, *Reidel* and *Thirty-Seven (37) Photographs* dealt only with commercial distribution or importation by means of government facilities. Other forms of obscenity-related activity have yet to be considered. Appellee submits that many of these activities are constitutionally protected and also fall within the ambit of Section 1462 of Title 18, United States Code. Because these activities are constitutionally protected, Section 1462 is necessarily void for overbreadth.

The Government concedes that Section 1462 could be applied where obscene material is transported by common carrier in interstate commerce for the transporter's personal use. (Brief for the United States, p. 12). Yet it was the personal use of obscenity which this Court protected from governmental interference in *Stanley v. Georgia, supra*. Because Section 1462 prohibits interstate transportation of obscene materials which are intended for the private use of the transporter, the section is fatally overbroad.

As a first illustration of this overbreadth, Section 1462 could be applied where persons travelling interstate were simultaneously engaged in reading obscene material. It is not uncommon for interstate travelers on commercial airliners, trains, and buses to read.[1] In this instance the passenger reading obscene material would be directly engaged in the process of receiving "information and ideas, regardless of their social worth. . . ." *Stanley v.*

[1]Common carriers are engaged in the transportation of goods and persons. See, 49 U.S.C. §1(1)(a), (3)(a).

Georgia, 394 U.S. at 564. Although the reader is engaged in unlawful conduct under the federal statute, he is at the same time engaged in the very activity which *Stanley* declared protected. 394 U.S. at 565.

The protection which was granted to viewing obscene material in *Stanley* has not been withdrawn by either *Reidel* or *Thirty-Seven (37) Photographs. Reidel* reaffirms the emphasis in *Stanley* on protection for "freedom of mind and thought" and quotes approvingly the language of *Stanley* that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *United States v. Reidel,* 402 U.S. at 356. See also, *United States v. Thirty-Seven (37) Photographs,* 402 U.S. at 376. Moreover, this Court in *Reidel* also stated:

> "[The] rights to have and view that material in private are independently saved by the constitution." 402 U.S. at 356.

As a second illustration, Section 1462 could be applied where the interstate transportation and possession combine with an intent to use the obscene material privately. In this instance the traveler with baggage containing obscene material is not engaged in reading the material while in transit, but he possesses it solely for his own use. His possession is equivalent to the possession of Stanley. Stanley was not viewing the materials when the search and seizure took place. Yet the Court recognized that possession for personal use was an activity closely related to the receipt of information and ideas and declared that possession protected. Just as the possession in *Stanley* was protected as an incident of personal use, so possession on a common carrier as an incident of personal use is also protected.

In these two hypotheticals, the possessors of the obscene materials accompany the materials while in transit without a purpose commercially to distribute the materials.

In a third hypothetical, the activities of transportation and possession do not occur simultaneously. The activity is undertaken solely for a private purpose with no intent to distribute. For example, a collector of pornography ships materials from his residence in one state to his residence in another. The collector would be exercising his continuous possession of his own material although he is both the shipper and consignee. In this example there is no act of distribution. This hypothesized conduct falls within the right to possess declared in *Stanley*. Appellee urges that the third hypothetical also falls within the scope of his right to receive. As stated by Mr. Justice Harlan in his concurrence to *Reidel*:

> "In other words, the 'right to receive' recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts; rather, it is a right to a protective zone ensuring the freedom of a man's inner life, be it rich or sordid." 402 U.S. at 359-360.

The foregoing illustrations of protected conduct all occur in essentially private settings. Any possibility of exposure of the material to children or intrusion upon unwilling adults is no greater than that in *Stanley*. Nonetheless the Government would restrict the privacy protected by *Stanley* to the home. "As far as obscene material is concerned, the rights one enjoys in the home are not the same as those enjoyed elsewhere." (Brief for the United States, p. 12.) The Government advances its

position by suggesting that *Stanley* is as much a Fourth Amendment privacy decision emphasizing the sanctity of the home, as it is a First Amendment decision. (Brief for the United States, pages 10-11.) This Court in *Stanley,* however, specifically mentioned that the setting of privacy within the home only gave "added dimension" to Stanley's right to receive information and ideas. 394 U.S. at 564. The holding in *Stanley* is that the First Amendment protects a person's right to read or observe what he wishes so long as he is in a private setting. The Fourth Amendment was not the basis for the majority opinion in *Stanley.* Nor is there any suggestion in *Reidel* or *Thirty-Seven (37) Photographs* that *Stanley* was based upon a Fourth Amendment concept of privacy.

The First Amendment also creates a zone of privacy. This Court stated in *Katz v. United States,* 389 U.S. 347, 350 (1967):

> "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion."

At footnote 5 of the same page the Court stated:

> "The First Amendment, for example, imposes limitations upon governmental abridgement of 'freedom to associate and privacy in one's associations.' N.A. A.C.P. v. Alabama, 357 U.S. 449, 462."

Even if appellee were to accept the Government's Fourth Amendment rationale for *Stanley,* he would not be able to accept the theory advanced that this right of privacy only encompasses in-home possession of obscenity. Under Fourth Amendment analysis, the concept

of privacy extends beyond one's residence. As was stated in *Katz,* 389 U.S. at 351:

> "[T]his effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. *For the Fourth Amendment protects people, not places.* What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (emphasis supplied).

Similarly, the First Amendment protects people, not places. The Government's preoccupation with the privacy of the home must be rejected.[2] Possession of obscene material which occurs in other private contexts is no less protected under the First Amendment.

At the outset the Government justifies a ban against all forms of interstate transportation of obscene materials by arguing that the risk of dissemination to unwilling recipients by accident or inadvertence will be decreased.[3] (Brief for the United States, p. 14). This Court stated

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[2]This Court in *Mancusi v. DeForte,* 392 U.S. 364, 368 (1968), stated:

> "The Court's recent decision in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed 2d 576, also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."

[3]The Government would draw the distinction between the luggage of an interstate traveler on a common carrier and the home on the grounds that suitcases can break open and the films might be exposed to unwilling viewers. The danger that appellee's suitcase will break open in transit and thereby expose obscene films to those who would be offended is no greater than the danger that sensitive burglars or delinquent juveniles would break into Stanley's house and be offended by his collection of erotica.

in *N.A.A.C.P. v. Alabama,* 377 U.S. 288, 307 (1964), that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." See also *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

Secondly, the Government claims that it "is frequently extremely difficult to differentiate between what is intended for private and public dissemination." (Brief for the United States, p. 15.)[4] Essentially the same justification was advanced by the State of Georgia in support of its statute and rejected by this Court in *Stanley*:

> "Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." 394 U.S. at 567-568.

Finally, the Government notes that as a matter of policy it does not seek enforcement of the federal ob-

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[4] *Cf.*, the Government's assertion in the same brief that "there is a clear conceptual line between commercial distribution and transportation for private use." (Brief for the United States, p. 6). See also, the Government's assertion that: "The distinction between transportation of obscenity for commercial purposes and that for personal use is sufficiently clear to remove any uncertainty regarding the reach of the statute." (Brief for the United States, p. 19).

scenity statutes where private or personal conduct is involved, citing *Redmond v. United States,* 384 U.S. 264 (1966). Although appellant denies it, this can be nothing other than a concession that Section 1462 is overbroad. Moreover, it is a concession that the Government has no legitimate interest in interfering with the First Amendment activity of personal possession or use of obscene materials.

B. Appellee Has Standing to Assert the Overbreadth of Section 1462.

The Government argues that appellee does not have standing to challenge the statute on its face since the indictment charges appellee with having transported materials under circumstances which imply that the materials were not for his own personal use.[5]

Appellee is charged with carrying eighty-three obscene films from San Francisco to Milwaukee. The indictment alleges that he carried these films on Trans-World Airlines and North Central Airlines. It is impossible to determine from this indictment whether there are any duplicates among these eighty-three films. Sixty-eight of the films are labeled with nine different numbers; none of the remaining films even bear the same label. Since the indictment alleges that appellee carried the films in interstate commerce, even though such conduct is not an element of Section 1462, it is reasonable to assume that appellee was a passenger on the aircraft and that the films were in his luggage.

Appellee was indicted for a violation of 18 U.S.C. §1462, and the language of the charge, with the excep-

[5]Brief for the United States, p. 19, note 8.

tion of the allegation that he carried the films, conforms to the statute. It is not alleged that the purpose of appellee's carrying these films was commercial, nor that he intended to sell or distribute these films. It is merely alleged that he carried them from San Francisco to Milwaukee.[6]

From this indictment and the fact that appellee was previously convicted of a violation of Section 1462, the Government asks this Court to infer that the purpose of appellee's carrying these films on the aircraft was commercial. The inference is unwarranted. The Government infers that one who has previously been convicted of being in the business of distributing obscenity is still in that business; it further infers that films bearing the same labels have identical contents and that he who has several copies of a particular film must be in the business of distributing films; and then from these inferences it further infers that the allegedly obscene films enumerated in the indictment were being transported in furtherance of that distribution. Appellee asserts that the facts are too far removed from the final inference which must be drawn; that the logic of the inferences is too attenuated; and that inferences may not be pyramided upon other inferences. *United States v. Ross*, 92 U.S. 281, 283 (1876).

The inference of transportation for purposes of sale or distribution being inappropriate, if this Court is to draw any inference it must assume that the collection of

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[6]It is of interest that appellee was not indicted for violating 18 U.S.C. §1465 although the allegations in the indictment would raise a presumption under that statute that the transportation was for sale or distribution. While it may be argued that the legislative history of Section 1465 confines its scope to private carriers, the language of the enactment certainly contains no such restriction.

erotica was for the personal possession and enjoyment of appellee. This personal possession is protected by *Stanley v. Georgia,* 394 U.S. 557 (1969), and no subsequent opinion of this Court has withdrawn this protection. It is no answer that the Government only prosecutes this private possession because appellee was previously convicted of this offense and hence there are "aggravating circumstances." *Redmond v. United States,* 384 U.S. 264 (1966). Appellee is not protected by the solicitude of the Solicitor, but by the Constitution.

Stanley interpreted the First Amendment to confer the right to possess privately obscene materials. No majority opinion of this Court since *Stanley* has restricted this right to the residence of the possessor. Each of the cases decided since *Stanley* has considered proposed extensions of the *Stanley* rationale to situations in which others could assert derivative rights related to the commercial distribution of obscenity. In *United States v. Reidel,* 402 U.S. 351 (1971), this Court refused to extend Stanley's right to possess to Reidel's right to distribute by the mails; in *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363 (1971), this Court refused to extend the right to possess to encompass the right to import for commercial distribution; in *Gable v. Jenkins,* 397 U.S. 592 (1970), the Court held that Stanley's right to possess did not confer upon a bookseller the correlative right to purvey pornography. See *United States v. Reidel,* 402 U.S. at 355. In each instance *Stanley* was not expanded to confer derivative First Amendment protections to those who distribute obscene material.

Appellee does not urge an extension of *Stanley;* he seeks no derivative rights from a possessor. He is a

possessor and asserts that the logic of *Stanley* compels the holding that one who possesses obscene material cannot be prosecuted for the act of possession and that it makes no difference where this private possession occurs. He asserts that absent any allegation that he intends to expose others to his collection of pornography or any allegation that his possession is a stage in a distributive process, his possession is protected by the First Amendment regardless of whether he is in his home or on an aircraft. For these reasons, appellee has standing to challenge Section 1462 on its face and as applied to him.

Even if this Court were to infer that the purpose of appellee's possession was commercial and hence unprotected, he nevertheless has standing to assert that the statute is overbroad as applied to transportation for personal use. This Court, as the Government concedes, has "consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965). (Brief for the United States, pp. 16-17).

In *N.A.A.C.P. v. Button,* 371 U.S. 415, 432 (1963), this Court stated:

> "For in appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible application of the statute in other factual contexts besides that at bar."

A censorship statute may be challenged on its face as violative of First Amendment rights "whether or not [a defendant's] conduct could be proscribed by a properly drawn statute. . . . " *Freedman v. Maryland,* 380 U.S. 51, 56 (1965).

The Government candidly acknowledges that this relaxed rule of standing was established to permit challenge to statutes which have a chilling effect on the exercise of First Amendment rights. Moreover, the reason for invalidating such an overbroad statute is to eliminate any deterrence of constitutionally protected activity. Because of the preferred status of First Amendment rights, individuals may attack a statute regardless of the nature of their own conduct in order to protect the rights of other persons who would otherwise refrain from exercising their First Amendment rights due to the vagueness or overbreadth of the statute. As this Court stated in *N.A.A.C.P. v. Button*, 371 U.S. at 432-433:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."

The Government argues that the chilling effect rationale is inapplicable to this case because the overbreadth of Section 1462 can be eliminated in a single prosecution, rather than by piecemeal construction. Appellant asserts that only where a statute is vague is it susceptible of varying interpretations and are repeated challenges required to delineate the permissible scope of the statute. It further argues that Section 1462 is not vague and is overbroad in only one respect, i.e., it can be applied to transportation for personal use. This analysis overlooks the fact that Section 1462 is capable of several unconstitutional applications because of its overbreadth, just as a vague statute is capable of several impermissible interpretations. Appellee has previously posited several

instances in which the statute can be applied to protected activity. Each aspect of overbreadth would have to be dealt with in a separate prosecution and would not necessarily be remedied by one saving construction of the statute excluding all "separable applications." See Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L. Rev. 76, 79 (1937).

C. Section 1462 is Not Susceptible of a Narrowing Construction Limited to Unprotected Conduct.

The Government closes its argument by contending that Section 1462 could be saved by a limiting construction in a single prosecution. Therefore, it argues, it was unnecessary and improper for the District Court to declare the statute void on its face. If this Court were to interpret Section 1462 to apply only to interstate transportation for sale or distribution, it would be adding an essential element to the crime. It would be inserting a requirement that the activity be accompanied by an intent to sell or distribute the material. This would amount to a major and substantial alteration of the statute.

The Government's proposed reconstruction of Section 1462 can be viewed as either one of two processes. Either the Government has asked this Court to add an element to the offense of transportation of obscene material which was not contemplated by Congress, or, in the alternative, this Court is asked to sever from the statute one of its possible applications. The first view runs afoul of the principle that Congress enacts law and not this Court;[7] the second overlooks the fact that the severability provisions which apply to Title 18, United States Code, do

[7]This Court stated in *Blount v. Rizzi,* 400 U.S. 410, 419 (1971): "[I]t is for Congress, not this Court, to rewrite the statute."

not authorize the severance of applications of the statute as, for example, do the severability provisions contained in 19 U.S.C. §1652.[8]

Section 1465, which also prohibits interstate transportation of obscenity, contains the express requirement that the activity be engaged in "for the purpose of sale or distribution." That particular language was enacted in 1955 by the Congress. Yet to this date Congress has made no comparable change in Section 1462 even though it was amended in 1970.

The District Court properly declared the statute void on its face since traditional rules of severability are inapplicable to statutes which are overbroad in the First Amendment area.[9]

Finally, the clarity of Section 1462's language prevents this Court from excising any applications of the stat-

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[8]Although Title 18 of the United States Code includes a general severability provision, Sec. 18, Act of June 25, 1948, C. 645, 62 Stat. 683, 859-862 (U.S.C.A. 1969), the provision is inapplicable to the instant case. No word of Section 1462 is sought to be severed; instead, it is the application of the statute to one who transports obscenity, without an intent to sell or distribute, that the Government urges be read out of 1462. If Title 18 contained a severability clause similar to that in 19 U.S.C. §1652 or 33 U.S.C. §950, such an excision would be feasible; however, this is not the case.

[9]The constitutional doctrine of First Amendment overbreadth expressed in *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *United States v. Robel*, 389 U.S. 258, 265-266 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); and *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), overrides any legislative or congressional policy of separability. "Since [a separability] provision only declares legislative intent that the invalidity of one portion or application of the statute should not invalidate the law entirely, the clause is immaterial to a rule which is applicable regardless of the desires of the legislature." Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 Harv. L. Rev. 1208, 1213 (1948).

ute. As was stated in *Aptheker v. Secretary of State*, 378 U.S. 500, 515-516 (1964):

> "The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting . . . ."

This reasoning was later reiterated in *United States v. Robel*, 389 U.S. 258, 267-268 (1967):

> "We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress."

Appellee concludes that Section 1462 sweeps within its ambit noncommercial possessory transportation of obscene materials and that such possession is protected by the First Amendment. For this reason Section 1462 is overbroad. Any attempt to narrow the application of 1462 to constitutionally permissible objectives would create a statute which Congress did not pass and would require multiple prosecutions to define the reach of the new offense. Appellee has standing to raise the overbreadth of Section 1462 and to invoke this overbreadth to void the statute.

II. SECTION 1462 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT CAN BE APPLIED TO INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL FOR DISTRIBUTIVE PURPOSES BY METHODS WHICH DO NOT INVOLVE GOVERNMENT OWNERSHIP OR OPERATION.

Appellee has earlier asserted that interstate transportation of obscene material is merely a form or incident of possession and that absent any commercial purpose this in-transit possession is protected by *Stanley*.

The issue remains whether transportation, even for purposes of sale, can be prohibited and, if so, by whom. Appellee continues to assert that transportation is a form of possession and questions whether possession for purposes of sale can be made criminal. It has been recognized at least since the separate opinion of Mr. Justice Harlan in *Roth v. United States*, 354 U.S. 476, 496 (1957), that the interest of the federal government in suppressing pornography is secondary to that of the states.

> "But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric." *Id.* at 504-505.

Thus, while a state legislature might validly conclude that it was worthwhile to experiment with a statute

which prohibited the possession of obscene matter for purposes of sale, it is not at all clear that Congress could enact such a statute. The power of Congress to enact Section 1462 is derived from the Commerce Clause, United States Constitution, Article I, Section 8, and while it is well established that this power extends to prohibiting noxious articles from interstate commerce, it does not extend to prohibiting articles which apparently cannot be demonstrated to have any harmful effect. *Stanley v. Georgia,* 394 U.S. at 566-567.

Each of the cases which has held that there is no right to distribute obscene material involved situations in which the federal government had a distinct, pervasive and exclusive interest in the mode of distribution. In *Reidel* the Court emphasized that Reidel sought to utilize the federal postal system to purvey obscenity and held that the Government was not required to allow its postal facilities to be used for this purpose.

> "He has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and *use the mails in the process.*" (emphasis supplied) *United States v. Reidel,* 402 U.S. 351 at 356.

This Court has traditionally recognized the plenary power of Congress to regulate the mails and customs as distinct from its power to regulate interstate commerce. As long ago as *Ex parte of Jackson,* 96 U.S. 727 (1878), it was specifically noted that Congress possessed a broader power to exclude material from the mails than it did from other modes of shipment.

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails." *Id.* at 735.

In *In re Rapier,* 143 U.S. 110 (1892), this Court explained that the Congressional power was greater over the postal system because it involved a direct use of government facilities:

> "The circulation of newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people." *Id.* at 134.

See also, *Public Clearing House v. Coyne,* 194 U.S. 497, 506-507 (1904), and *Roth v. United States,* 354 U.S. at 493, for discussions of the extent of government control of the mails.

In *Thirty-Seven (37) Photographs* the claimant sought to require the acquiescence of customs inspectors to his importation of obscene photographs for the purpose of subsequent commercial exploitation. Again the Court held that the historic right of the sovereign to exclude imports foreclosed the claimant.

> "Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country." 402 U.S. at 376.

As with the mails, an essential difference in the power of Congress to regulate customs as compared to interstate commerce has been recognized. In *Brolan v. United States,* 236 U.S. 216, 218 (1915), this Court noted:

> "Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, *so far as interstate commerce is concerned,* it is not to be doubted that from the beginning Congress has exercised a plenary power in re-

spect to the exclusion of merchandise brought from foreign countries. . . ." (emphasis supplied)

Elsewhere in the same opinion, the Court referred to the "broad distinction which exists between the two powers" "of Congress to regulate interstate commerce" and "to absolutely prohibit foreign importations." *Id.* at 222. See also, *University of Illinois v. United States,* 289 U.S. 48, 57 (1933).

The line of cases which emphasizes the plenary power of Congress to regulate the mails and to restrict imports continues through *Roth* and finds most recent expression in *Reidel* and *Thirty-Seven (37) Photographs.*

Thus *Reidel* and *Thirty-Seven (37) Photographs* can each be read to mean that the distribution of obscenity is a dirty business and that no one has the right to force the government to be a partner in the sordid enterprise. Neither should be read to authorize the prosecution of a possessor of obscenity who does not seek to involve the Government in his distributive process.

Appellee suggests that at least so far as the federal government is concerned transportation for purposes of sale and possession for purposes of sale are protected activities absent certain specific objections. Such objections as insufficient insulation from children or unwilling adults public pandering, concededly might vitiate the protected status of the conduct involved, and under such circumstances penal sanctions could be applied. But as long as the possession and transportation are effected in a manner consistent with the expectation of privacy, that privacy exists.

Appellee asserts that even the commercial distributor has a reasonable expectation of privacy. He has a right

to be let alone by the federal government just as long as he doesn't seek the affirmative cooperation of the government in running his business. The reach of the Commerce Clause is shortened by this right to be let alone and Section 1462 invades this right of privacy and offends the Constitution.

In *United States v. Reidel*, 402 U.S. 351, 357 (1971), the Court invited state legislatures to consider amending obscenity laws to permit adults access to such materials.

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. . . . This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. *Roth* and like cases pose no obstacle to such developments." *Id.*

Oregon has enacted new legislation in the area of obscenity. It is no longer unlawful for adults to sell, purchase or view what is obscene unless the distribution is done in such a manner that juveniles and unwilling recipients are protected. Chapter 743, Oregon Laws of 1971, Sections 255 through 262 (effective January 1, 1972). Section 1462 stands athwart the channels of distribution and prevents the shipment by common carrier of obscene materials into Oregon regardless of the intent of the Oregon legislature, and regardless of whether the state in which the shipment originated similarly permitted the production of obscene materials.

The right of the individual to be let alone and to enjoy his zone of privacy can only be invaded by some compelling governmental interest. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In any given circumstance the interest of the federal government may be greater or less than that of a state. When the interest of one of these sovereigns does not justify the invasion of this privacy, then the Ninth Amendment is violated, and the Statute which authorizes this invasion is unconstitutional, even though the invasion by a sovereign with a more compelling need might not be prohibited. In this sense Section 1462 must fail; it permits the invasion of a zone of privacy by a government when it has no compelling need to do so.

CONCLUSION

For the foregoing reasons appellee respectfully urges this Court to affirm the order of the District Court dismissing the indictment and holding that 18 U.S.C. §1462 is violative of the Constitution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-2

UNITED STATES OF AMERICA,
Appellant,

—v.—

TWELVE 200-FOOT REELS OF SUPER 8 MM. FILM, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 70-69

UNITED STATES OF AMERICA,
Appellant,

—v.—

GEORGE JOSEPH ORITO,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide non-partisan organization of over 160,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-one year existence the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press. While our original concern was with efforts to restrict political expression, we have long maintained that all forms of speech and writing, including "obscenity", are presumptively entitled to blanket constitutional protection.

These cases involve important questions concerning the constitutionally proper reach of two federal statutes regulating obscenity. Although this Court has upheld broad congressional power in this area, these statutes encompass prohibitions which are unrelated to legitimate governmental interests. It is our purpose to suggest that the Court identify and limit those goals which such legislation should pursue.

Introduction and Summary of Argument

These cases involve challenges to two federal statutes which respectively proscribe under any circumstances the importation of obscene materials, 19 U.S.C. Section 1305 and the transportation of such materials in interstate commerce by common carrier, 18 U.S.C. Section 1462. The

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* Letters of consent from the Government and from counsel for Appellee Orito to the filing of this brief have been filed with the Clerk. It is our understanding that efforts to communicate with the claimant-appellee in No. 70-2, Arial Paladini, who is appearing *pro se*, have been unsuccessful, and, accordingly that the Court has appointed Thomas Kuchel, Esq., as special *amicus curiae* in support of the judgment below.

analytical issue to be resolved is at which point on the continuum between the holding of *Stanley* v. *Georgia*, 394 U.S. 557 (1969), that the mere private possession and use of obscenity cannot be interdicted, and the more recent rulings in *United States* v. *Reidel*, 402 U.S. 351 (1971) and *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), reaffirming that the commercial distribution of obscenity may continue to be proscribed, is the line of constitutional protection to be drawn.

The decision in *Stanley* v. *Georgia* contained the potential for redirecting this Court's obscenity doctrines away from an emphasis on the content of the expression and toward an analysis of the governmental interests advanced by the particular statutory arrangement. For the first time this Court held that an adult could possess and peruse obscenity in the privacy of his home without interference by the state. Based on this premise, various lower federal courts ruled that statutes which proscribed mere possession of obscenity under all circumstances were defective because they were not limited to pursuing those goals which *Stanley* suggested were valid. E.g., *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969, 3-judge court), *vacated on other grds.*, sub nom. *Dyson* v. *Stein*, 401 U.S. 200 (1971); *United States* v. *Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D.N.Y. 1970, 3-judge court), *prob. juris. noted*, 402 U.S. 971, *dism. per Rule 60*, 403 U.S. 942 (1971); *United States* v. *Dellapia*, 433 F.2d 1252 (2d Cir. 1970).

In *Reidel* and *Thirty-Seven Photographs* the Court dealt with federal obscenity statutes from the perspective at the opposite end of the mere possession/commercial distribution spectrum. In *Reidel*, the majority opinion, relying on *Roth* v. *United States*, 354 U.S. 476 (1957), upheld the gen-

eral validity of 18 U.S.C. Section 1461 as applied to commercial distributors who disseminate obscene matter through the mails. A plurality opinion in *Thirty-Seven Photographs* upheld the ban on importation of obscene materials as applied to items which the importer ultimately intended for public commercial distribution. While these two cases may have been correctly decided in light of their commercial contexts, their narrow reading of the principles of *Stanley* v. *Georgia* tends to inhibit a more traditional First Amendment analysis of obscenity legislation. Cf. *United States* v. *Various Articles of "Obscene" Merchandise, supra.*

In any event, the two statutes challenged here are susceptible of application in a variety of circumstances which are much more closely assimilated to the use and possession afforded protection by *Stanley* than to the commercial distribution model to which *Roth, Reidel* and *Thirty-Seven Photographs* pertain. For example, Section 1305 by its terms can be utilized to prevent an adult from legally purchasing a pornographic novel in Scandinavia and bringing it home in his suitcase, for its ultimate destination in his library. Similarly, Section 1462 theoretically prevents a person from taking an obscene book in his brief case on a business trip if he rides on a common carrier. Even if *Stanley* is read as a decision relying primarily on concepts of privacy, as the government contends, its protection does not cease at a man's front door, for the right of privacy "protects people, not places". *Katz* v. *United States,* 389 U.S. 347, 351 (1967). Rummaging a man's suitcase to inquire what literature satisfies his emotional needs is analytically no less intrusive of privacy than rifling his closets for the same purpose.

Since both statutes are capable of reaching a substantial range of conduct protected under the principles of *Stanley*, including the conduct of these appellees, they are defectively overbroad. With regard to Section 1305, the Court should announce a *per se* rule that it cannot validly be applied to essentially private importation of obscenity. See *United States* v. *Various Articles of "Obscene" Merchandise, supra;* Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970). Deferring to a case-by-case adjudication of its validity will, in effect, mean that the statute's broad reach will go unchallenged. For similar reasons, Section 1462 should be invalidated as overbroad.

ARGUMENT

I.

The rationale of *Stanley* v. *Georgia* is applicable to the private use and possession of obscene material by adults in any setting.

The government's theory in these cases is that *Stanley* v. *Georgia* is a decision essentially, if not exclusively, vindicating the interests of privacy in the home. But *Stanley* was both argued and decided primarily as a First Amendment case. The language, analysis and conclusions of the opinion were premised on protecting freedom of thought. Stanley argued that a statute which "punishes mere private possession of obscene matter violates the First Amendment," and the Court agreed. 394 U.S. at 559. In reaching this conclusion, the Court distinguished most of its previous obscenity decisions as having dealt with "use of the mails to distribute objectionable material or with some form of public distribution or dissemination." *Id.* at 561.

But where possession of such material for private enjoyment is concerned, different interests are involved. The Court specifically rejected Georgia's contention that it could nevertheless "protect the individual's mind from the effects of obscenity," *id.* at 550, characterizing the assertion as a claimed right to thought control, offensive to the principles of the First Amendment.

To be sure, the intrusion into Stanley's home was a factor in the decision. But this element was "an added dimension" reinforcing, though not limiting, the "right to receive information and ideas, regardless of their social worth. . . ." *Id.* at 564. And if the First Amendment means that the government may not control men's minds by telling a person sitting alone in his own home what he may read, *id.* at 565, then it is difficult to understand what principled reasons would allow the same intrusion elsewhere. Even reading *Stanley* as essentially a privacy decision, the right of privacy has been held to protect "people, not places." *Katz* v. *United States,* 389 U.S. 347, 351 (1967); *Dellapia* v. *United States,* 433 F.2d 1252 (2d Cir. 1970). To limit the decision to the confines of one's home is to return to the doctrine of "constitutionally protected areas" abandoned in *Katz.* The businessman who takes an obscene book from his library, carries it in his brief case, reads it in his hotel room and thereafter returns it to his home should be protected from governmental intrusion throughout his journey; his First and Fourth Amendment interests do not significantly change throughout that time. The traveler returning from abroad with a similar book intended for his library should be entitled to the same protection. If these situations are not constitutionally protected, then as Mr. Justice Black noted, *Stanley* simply sustains a man who "writes salacious books in his attic, prints them in his base-

ment, and reads them in his living room." *United States* v. *Thirty-Seven Photographs, supra* at 28 L. Ed.2d 837 (dissenting opinion).

That *Stanley* meant more than this was recognized by many of the lower federal court decisions which followed it. Based on *Stanley's* analysis of the kinds of interests which could sustain obscenity legislation, various courts invalidated legislative arrangements which by their reach impinged upon interests which *Stanley* had held to be protected. E.g., *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969, 3-judge court), *vacated on other grds.*, sub nom. *Dyson* v. *Stein*, 401 U.S. 200 (1971); *United States* v. *Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970, 3-judge court), *prob. juris. noted*, 402 U.S. 971, *appeal dismissed per Rule 60*, 403 U.S. 942 (1971); *United States* v. *Dellapia*, 433 F.2d 1252 (2d Cir. 1970).

In *United States* v. *Dellapia* a prosecution was brought under 18 U.S.C. Section 1461 for the private mailing of obscene films. Viewing *Stanley* as having written "a new chapter" in obscenity analysis, the Second Circuit focused on the governmental interests being advanced by the particular prosecution. Since none of the interests subsumed within the concept of "public distribution" were infringed by the defendant's conduct, the reasoning of *Stanley* was controlling:

> The privacy that *Stanley* protects is the privacy of confidential communication or the privacy of being let alone if the communication does not harm others, not privacy in any other aspect. In *Stanley* the Court protected the "confidential communication" between a solitary viewer and a dirty movie or the right to be let alone with that movie—no matter how abhorrent the

> film may have been. * * * It would be anomalous to prevent consenting adults from freely passing among themselves obscene material which *Stanley* tells us each of them was entitled to possess and view or read. 433 F.2d at 1258.

Concluding that the defendant's conduct was protected, the Court construed the statute's "broad prohibition as subject to an underlying requirement that the mailing trespass upon a valid governmental interest which constitutionally justifies invasion of a private consensual relationship . . ." 433 F.2d at 1260.

Similarly, *United States* v. *Various Articles of "Obscene" Merchandise, supra* involved a challenge to the customs statute as applied to a person who sought to import single items for his own private use. Summing up the cases from *Roth* to *Stanley*, Circuit Judge Moore concluded that "orthodox First Amendment considerations are once again of paramount importance, *Roth* notwithstanding, even where the publications in issue are concededly obscene." 315 F. Supp. at 195. Finding no valid interests served by preventing the importer from receiving single copies of such publications, the court concluded that the broad prohibition of Section 1305 was unconstitutional as applied to importation for private use and enjoyment.

Such interpretations of *Stanley* are of continued vitality notwithstanding the Court's more recent decisions in *Reidel* and *Thirty-Seven Photographs*. Both of those decisions upheld the broad federal prohibition on mailing or importing obscene materials in the context of actual or intended commercial distribution. *Reidel* involved the application of Section 1461 to those who "are routinely disseminating ob-

scenity through the mails" and can make no claim about intrusions into the privacy of their home. 28 L. Ed.2d at 817. The majority opinion reasoned that Stanley's right to peruse obscene material in his home did not imply Reidel's right to sell it to him. *Thirty-Seven Photographs* involved application of Section 1305 to an importer who intended to incorporate those photographs into a book for commercial distribution. While a plurality of the Court felt that the statute could validly encompass private importation, the premises of the decision was the validity of a ban on importation in the commercial context. Neither of the two rulings is inconsistent with the reasoning and analysis in *Stanley* which are of continued relevance.[1]

II.

The statutes at issue are unconstitutional because they encompass a variety of situations and contexts where the possession of obscene materials is protected under the principles of *Stanley* v. *Georgia*.

Section 1305 contains a blanket prohibition on the importation of obscene material regardless of the context or the intended use. Section 1462 similarly proscribes the transportation of such materials by common carrier. These two statutes are capable of application in a variety of situations where the possession of obscene materials can be as-

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[1] For example, in *United States* v. *Various Articles of "Obscene" Merchandise*, the court anticipated the majority view in *Thirty-Seven Photographs* by refusing to invalidate Section 1305 on its face and extending the decision "beyond the statute's application to the importation of obscene matter for purposes other than commercial dissemination" 315 F. Supp. at 197. Similarly, *Reidel* could have been decided the same way even under the kind of analysis of interests employed in *Stanley*. See, *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 233, n. 30 (1971).

similated to the area of protection enunciated in *Stanley* v. *Georgia,* and accordingly are defectively overbroad.

A. *Section 1305*

The reach of the customs statute was best described by Justice Stewart,

> The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad, returns home with a single book in his charge, with no intention of selling it or otherwise using it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley* v. *Georgia*. . . . *United States* v. *Thirty-Seven Photographs, supra,* 28 L.Ed.2d at 835 (concurring opinion).

The government does not raise a strenuous challenge to Justice Stewart's analysis, but instead offers various justifications for sustaining the statute in all of its applications.

First, the government argues that since individuals can be prevented from importing obscene materials by mail, even though intended for private use, then it would be "odd" to allow a right of importation for those who personally purchase obscene materials abroad. But we challenge the premise that *Thirty-Seven Photographs* and *Reidel* preclude a right of private importation by mail. When an adult in this country requests and receives an obscene book from a distributor abroad, the actual sale of the book does not offend state or federal law, and its receipt for private use is protected. Moreover, while there is no mechanism to interdict domestic mail to determine

whether it is obscene and whether the recipient wishes to receive it, the government does claim and exercise the right to examine mail matter from abroad and thus has the opportunity to make these inquiries to determine whether the importation infringes valid interests. Finally, even assuming that private importation by mail can be prohibited, it is still not "odd" at least to allow such importation when effected personally. If the traveler described by Justice Stewart is entitled to the protection of *Stanley's* principles, then that protection should not be withheld simply because the statute can validly be applied to other methods of private importation. In the First Amendment area, where precise tools are required and least drastic alternatives preferred, the odd phenomenon is an argument that a statute validly applicable to most situations should be held constitutional in all instances.

Second, the government contends that upholding a right of private importation would yield no measurable gain for the privacy of individuals.[2] But the power to regulate foreign commerce, like the power over the mails, cannot be utilized to enhance the government's substantive capacity to infringe on First Amendment interests. See *Lamont* v. *Postmaster General,* 381 U.S. 301, 305 (1965); *Hiett* v. *United States,* 415 F.2d 664 (5th Cir. 1969); *United States* v. *18 Packages of Magazines,* 238 F. Supp. 846, 848 (N.D. Cal. 1964). The fact that a returning traveler must surrender certain privacy and submit to a luggage search for

[2] The argument is partly based on an excessive assertion of the government's power to search at the border, see *United States* v. *Johnson,* 425 F.2d 630 (9th Cir. 1970), *cert. granted,* 400 U.S. 990, *dismissed per Rule 60,* 30 L. Ed.2d 35 (1971), and also premised on a continuing characterization of obscenity as though it were contraband, an attitude which cannot survive *Stanley's* holding.

smuggled diamonds or dutiable items does not justify the confiscation of an obscene book. The interests identified in *Stanley* protect against rummaging through a traveler's mind, not his luggage. The gravaman of the harm is telling a man he may not read or import the book because it may stimulate salacious thoughts. The damage is in surrendering the book, not submitting it for inspection intended to determine whether it contains narcotics or dirty pictures. The seizure of an obscene book is just as repugnant to constitutional values as the confiscation of Communist literature. Cf. *Lamont* v. *Postmaster General, supra.*

Third, the government resurrects an argument rejected in *Stanley*, namely, that it may prohibit importation of obscenity for private use in order to vindicate its interests in regulating public, commercial distribution. This Court was not concerned with the problem of "tracking" Mr. Stanley's film, and there should be no such concern here. There are narrower alternatives available to the government to accomplish valid goals. A variety of simple criteria and methods can be utilized to insure that the material is intended for the individual's own use. Customs officials can make a brief inquiry and solicit a response under oath.[3] The quantity of material could give rise to a presumption of commercial intent.[4] Finally, even if there is a small amount of fraudulently imported obscenity, it should be

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[3] Such a procedure would involve no added inconvenience to customs officials who now have to administer the seizure provisions. With regard to mail importations, customs officials now notify the addressee of the seizure and request assent to forfeiture. They would simply have to draft a new letter.

[4] In New York, like other states, one who possesses six or more identical or similar obscene articles is presumed to have an intent to sell them. N. Y. Penal Code, Section 235.10(2). See also, ALI Model Penal Code, Tent. Draft No. 6, Section 207.10(5).

remembered that a book or film which is admitted into this country (even those held not to be obscene) must nevertheless face an array of other federal and local barriers. Compare *United States* v. *A Motion Picture Film Entitled "I Am Curious-Yellow,"* 404 F.2d 196 (2d Cir. 1968) with *Karalexis* v. *Byrne,* 306 F. Supp. 1363 (D. Mass. 1969, 3-Judge court), *vacated on other grounds,* 401 U.S. 216 (1971) (involving the same film).

Finally, the substantial and, we submit, constitutionally required distinction between importation for private purposes and importation for commercial distribution is even reflected in a portion of the statute and in the administrative practice under it. Indeed, Section 1305 itself affords the Secretary discretion to admit the "so-called classics or books of recognized and established literary or scientific merit," when imported for *non-commercial purposes.* Though any such book would presumably never be found obscene because it possesses redeeming social value, nevertheless "the line between commercial and other importations extends a distinction to which the Congress was sensitive when it enacted Section 305". *United States* v. *Various Articles of "Obscene" Merchandise, supra* at 197. Similarly, even the Bureau of Customs recognized that "the passenger having in his luggage a single copy of a picture, book or magazine acquired abroad for his own use and not for resale, presents a special problem" and urged its inspectors to give such individuals "the benefit of any doubt in determining whether 'hard-core pornography' is involved". Bureau of Customs Circular, RES-15-PEN, January 15, 1964.

B. *Section 1462*

This statute contains defects of overbreadth similar to those found in the customs prohibition. It interdicts a wide variety of instances where an individual is in possession of obscene material under circumstances which entitle him to invoke the protection of *Stanley* v. *Georgia*. We do not wish to duplicate the analysis of this statute's overbreadth contained in appellee Orito's brief. We would, however, suggest that the proper principle for deciding these cases is as follows:

> . . . the protection granted to the possession of pornography in the home ought to be extended to all situations involving mere private possession by an adult. So long as the material is meant simply for private use of the individual and is not likely to be circulated, he retains a privacy interest regardless of his location and there seems to be no contrary state interests beyond those found insufficient in *Stanley*. *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 236 (1971).

III.

The Court should declare now that these statutes are unconstitutionally overbroad.

We have argued that both statutes can be employed in a variety of instances where the possession of obscene material should be protected by the principle of *Stanley* v. *Georgia,* i.e., possession assimilated to personal use and enjoyment. If the Court agrees that these statutes are substantially overbroad, then two alternatives are available, either declare the statutes facially void or create a rule of First Amendment privilege based on the distinction between commercial and other uses of obscenity. Section 1305 is amenable to the latter approach, Section 1462 requires invalidation on its face.

In *Thirty-Seven Photographs,* the customs statute was upheld as applied to commercial importation. The issue here is importation for private, noncommercial use. But a variety of situations are encompassed within that concept. Whether or not the Court upholds the judgment below, other private importers will not know precisely what range of valid application the statute has in terms of quantity of materials, mail as opposed to personal importation, and the like.

Such uncertainty is particularly unfortunate with regard to Section 1305 whose primary effect is felt on individuals who seek to import isolated single copies of magazines or books for their own perusal.[5] First, there are severe venue

[5] For example, in the Southern District of New York the practice is to engage in "multiple seizures," i.e., dozens or hundreds of items intended for a similar number of separate importers are proceeded against in one complaint. In 1968, 2988 separate pack-

problems, since the statute mandates that forfeiture proceedings be brought in the district of the seizure, not where the addressee or importer resides. Second, there are cost burdens of traveling to that district and/or retaining counsel. Few private importers will be willing to assume these costs and burdens in order to litigate their right to a single book or magazine. Indeed, the entire system appears to be premised on the expectation that few will challenge the censor's decision. It is ironic that only those with a profit motive, i.e., the commercial importer, will have the interest in challenging the administrative determination for procedural or substantial defects, while those who claim constitutional protection under *Stanley* will be unable to vindicate their rights. Self-censorship will be the result.

Enunciating a broad rule excising private importation from the operation of the statute will avoid these uncertainties. The distinction between commercial and other activity with regard to obscenity is sensible, has a basis in the statute and its history, has been utilized in other First Amendment contexts and conforms to judicial policies which govern the operation of the overbreadth doctrine. See *United States* v. *Various Articles of "Obscene" Merchandise, supra,* 315 F. Supp. at 196-97; *United States* v. *New Orleans Bookmart,* 328 F. Supp. 136 (E.D. La. 1971); see generally, Note, *The First Amendment Overbreadth Doctrine, supra* at 921.

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ages belonging to approximately 2000 different claimants were subject to forfeiture actions. Only three of those persons filed an answer. See Cross-Jurisdictional Statement in *Various Articles of "Obscene" Merchandise* v. *United States,* O.T. 1970, No. 778, *app. dismissed,* 400 U.S. 935 (1970) at pp. 8-10. It is our understanding that recently there has been some increase in the number of private claimants who have filed letter-answers to the forfeiture proceedings.

The overbreadth considerations applicable to Section 1462 are somewhat different. It too is susceptible to a wide range of unconstitutional applications, as the appellee's brief in No. 70-69 indicates. By virtue of the "continuing offense" designation, there are venue burdens similar to those presented by Section 1305. See *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D.C. D.C. 1967), *aff'd mem.*, 390 U.S. 457 (1968). Moreover, this statute does not readily lend itself to a distinction between commercial and other forms of transportation. Unlike Section 1305, it does not have an implicit sensitivity to such a distinction for certain purposes. Cf. *United States* v. *Various Articles of "Obscene" Merchandise, supra* at 196-97. Nor is there any background of administrative recognition of such differing interests. *Cf.* Bureau of Customs Circular, RES-15-PEN, *supra*. There is no administrative mechanism such as a customs inspection which affords the opportunity to draw the line. Finally, given the continued vitality of Section 1461, and the existence of state laws regulating obscenity, the potential harm from an interregnum statutory gap, should Section 1462 be invalidated, would be minimal.

CONCLUSION

For the reasons set forth above, the judgments should be affirmed.

Respectfully submitted,

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January 1972

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ORITO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 70-69. Argued January 19, 1972—Reargued November 7, 1972—Decided June 21, 1973

Appellee was charged with knowingly transporting obscene material by common carrier in interstate commerce, in violation of 18 U. S. C. § 1462. The District Court granted his motion to dismiss, holding the statute unconstitutionally overbroad for failing to distinguish between public and nonpublic transportation. Appellee relies on *Stanley* v. *Georgia*, 394 U. S. 557. *Held:* Congress has the power to prevent obscene material, which is not protected by the First Amendment, from entering the stream of commerce. The zone of privacy that *Stanley* protected does not extend beyond the home. See *United States* v. *12 200-Ft. Reels Film*, *post*, p. —; *Paris Adult Theatre I* v. *Slaton*, *ante*, p. —. This case is remanded to the District Court for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California*, *ante*, p. —; *United States* v. *12 200-Ft. Reels*, *supra*, and this opinion. Pp. 2-6.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 70-69

United States, Appellant, v. George Joseph Orito. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with a violation of 18 U. S. C. § 1462[1] in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans World Airlines and North Central Airlines, copies of [specified] lewd, lascivious, and filthy materials. . . ." The materials specified included some 83 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and

[1] 18 U. S. C. § 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; . . .

. . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Ninth Amendment rights.[1] The District Court granted his motion, holding that the statute was unconstitutionally overbroad since it failed to distinguish between "public" and "non-public" transportation of obscene materials. The District Court interpreted this Court's decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), *Redrup* v. *New York*, 386 U. S. 767 (1967), and *Stanley* v. *Georgia*, 394 U. S. 557 (1969), to establish the proposition that "non-public transportation" of obscene materials was constitutionally protected.[2]

Although the District Court held the statute void on its face for overbreadth, it is not clear whether the statute was held to be overbroad because it covered transportation intended solely for the private use of the transporter, or because, regardless of the intended use of the materials, the statute extended to "private carriage" or "nonpublic" transportation which in itself involved no risk of exposure to the children or unwilling adults. The United States brought this direct appeal under the former 18 U. S. C. § 3731 (1964 ed.) now amended, 1971 Pub. Law 91-644 § 14 (a). See *United States* v. *Spector*, 343 U. S. 169, 171 (1952).

The District Court erred in striking down 18 U. S. C. § 1642 and dismissing respondent's indictment on these "privacy" grounds. The essence of respondent's conten-

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[1] Appellee also moved to dismiss the indictment on the grounds that 18 U. S. C. § 1462 does not require proof of *scienter*. That issue was not reached by the District Court and is not before us now.

[2] The District Court stated:

"By analogy, it follows that with the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors. . . . I find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes." 338 F. Supp. 308, 310 (1970).

tions is that *Stanley* has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it or distribute it. We have rejected that reasoning. This case was decided by the District Court before our decisions in *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971); and *United States* v. *Reidel*, 402 U. S. 351 (1971). Those holdings negate the idea that some zone of constitutionally protected privacy follows such materials when they are moved outside the home area protected by *Stanley*.[4] *United States* v. *Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (opinion of WHITE, J.) (1971). *United States* v. *Reidel*, *supra*, 402 U. S., at 354–356 (1971). See *United States* v. *Zacher*, 332 F. Supp. 883, 885–886 (ED Wis. 1971). But cf. *United States* v. *Thirty-Seven Photographs*, 402 U. S., at 379 (STEWART, J., concurring (1971).

The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972); *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); *Griswold* v. *Connecticut*, *supra*, 381 U. S., at 486 (1965); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925). But viewing obscene films in a commercial theater open to the adult public, see *Paris Adult Theatre I* v. *Slaton*, — U. S. — (pp. 15–17) (1973), or transporting such films in common carriers in interstate commerce, has no such claim to such special con-

[4] "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs *in the privacy of his own home*." *Stanley* v. *Georgia*, *supra*, 394 U. S., at 565 (1968). (Emphasis added.)

sideration.[5] It is hardly necessary to catalog the myriad activities that may lawfully be engaged in within the privacy and confines of the home, but may be prohibited in public. The Court has consistently rejected constitutional protection for obscene material outside the home. See *United States* v. *Twelve 200-Ft. Reels*, — U. S. — (pp. 4–6) (1973); *Miller* v. *California*, — U. S. — (pp. 8–9); *United States* v. *Reidel*, *supra*, 402 U. S., at 354–356 (1971) (opinion of WHITE, J.); *id.*, at 357–360 (Harlan, J., concurring); *Roth* v. *United States*, 354 U. S. 476, 484–485 (1957).

Given (a) that obscene material is not protected under the First Amendment, *Miller* v. *California*, *supra*, *Roth* v. *United States*, *supra*, (b) that the government has a legitimate interest in protecting the public commercial environment by preventing such materials from entering the stream of commerce, see *Paris Adult Theatre*, *supra*, — U. S., at — (pp. 8–15) (1973), and (c) that no constitutionally protected privacy is involved, *United States* v. *Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (1971) (opinion of WHITE, J.), we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because material is intended for the private use of the

[5] The Solicitor General points out that the tariffs of most, if not all, common carriers include a right of inspection. Resorting to common carriers, like entering a place of public accommodation, does not involve the privacies associated with the home. See *United States* v. *Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (1971) (opinion of WHITE, J.); *United States* v. *Reidel*, *supra*, 402 U. S., at 359–360 (1971) (Harlan, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 551–552 (1961) (Harlan, J., dissenting); *Miller* v. *United States*, 431 F. 2d 655, 657 (CA9 1970); *United States* v. *Melvin*, 419 F. 2d 136, 139 (CA4 1969).

transporter. That the transporter has an abstract proprietary power to shield the obscene material from all others and to guard the material with the same privacy as in the home is not controlling. Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent. Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene materials, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause. See *Paris Adult Theatre* v. *Slaton*, *supra*, — U. S., at — (pp. 8–14) (1973). See also *United States* v. *Alpers*, 338 U. S. 680, 681–685 (1950); *Brooks Weber* v. *Freed*, 239 U. S. 325, 329–330 (1915). "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray* v. *United States*, 195 U. S. 27; *Sonzinsky* v. *United States*, 300 U. S. 506, 513, and cases cited." *United States* v. *Darby*, 312 U. S. 100, 115 (1941). "It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature." *North American Co.* v. *Securities and Exchange Comm'n*, 327 U. S. 686, 705 (1946).[6]

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[6] "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil

As this case came to us on the District Court's summary dismissal of the forfeiture action, no determination of the obscenity of the material involved has been made. Today, for the first time since *Roth* v. *United States*, 354 U. S. 476 (1957), we have arrived at standards accepted by a majority of this Court for distinguishing obscene material, unprotected by the First Amendment, from protected free speech. See *Miller* v. *California*, *supra*, — U. S., at — (pp. 8–10) (1973), *United States* v. *Twelve 200-Ft. Reels of Super 8mm. Film*, *supra*, — U. S., at — (p. 7, n. 7) (1973). The decision of the District Court is therefore vacated and the case is remanded for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California*, *supra*, *United States* v. *Twelve 200-Ft. Reels*, *supra*, and this opinion.

Vacated and remanded.

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or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. . . . In the *Lottery Case*, 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. . . . In *Hoke* v. *United States*, 227 U. S. 308 and *Caminetti* v. *United States*, 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. . . . In *Weber* v. *Freed*, 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralising effect of such exhibitions in the State of destination." *Brooks* v. *United States*, *supra*, 267 U. S., at 436–437 (1925).

SUPREME COURT OF THE UNITED STATES

No. 70-69

United States, Appellant, v. George Joseph Orito.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[June 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

We held in *Stanley* v. *Georgia*, 394 U. S. 557, that an individual reading or examining "obscene" materials in the privacy of his home is protected against state prosecution by reason of the First Amendment made applicable to the States by reason of the Fourteenth. We said:

> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books

he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*, at 565.

By that reasoning a person who reads an "obscene" book on an airline or bus or train is protected. So is he who carries an "obscene" book in his pocket during a journey for his intended personal enjoyment. So is he who carries the book in his baggage or has a trucking company move his household effects to a new residence. Yet 18 U. S. C. § 1462* makes such interstate carriage unlawful. Appellee therefore moved to dismiss the indictment on the ground that § 1462 is so broad as to cover "obscene" material designed for personal use.

The District Court granted the motion, holding that § 1462 was overbroad and in violation of the First Amendment.

The conclusion is too obvious for argument, unless we are to overrule *Stanley*. I would abide by *Stanley* and affirm this judgment, dismissing the indictment.

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*"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."

SUPREME COURT OF THE UNITED STATES

No. 70-69

United States, Appellant, v. George Joseph Orito. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[June 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 18 U. S. C. § 1462, which makes it a federal offense to "[bring] into the United States, or any place subject to the jurisdiction thereof, or knowingly [use] any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character." Appellee was charged in a one-count indictment with having knowingly transported in interstate commerce over 80 reels of allegedly obscene motion picture film. Relying primarily on our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), the United States District Court for the Eastern District of Wisconsin dismissed the indictment, holding the statute unconstitutional on its face:

> "To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government's prerogatives: on its face, it forbids the transportation of obscene materials. Thus, it applies to non-public transpor-

tation in the absence of a special governmental interest. The statute is thus overbroad, in violation of the first and ninth amendments, and is therefore unconstitutional." 338 F. Supp. 308, 311 (ED Wis. 1970).

Under the view expressed in my dissent today in *Paris Adult Theatre* v. *Slaton*, *post*, it is clear that the statute before us cannot stand. Whatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face. See my dissent in *Miller* v. *California*, *ante*. I would therefore affirm the judgment of the District Court.